No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

MOTION FOR LEAVE TO FILE PETITION, PETITION, AND BRIEF IN SUPPORT

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May 2010

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and

STATE OF COLORADO,

Defendants.

MOTION FOR LEAVE TO FILE PETITION

COMES NOW the State of Kansas, by and through its Attorney General, and moves the Court for leave to file the accompanying Petition. The grounds for the Motion are set out in the accompanying Brief in Support of Motion for Leave to File Petition.

Respectfully submitted,

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STATE OF KANSAS,

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STATE OF COLORADO,

Defendants.

PETITION

COMES NOW the State of Kansas, by and through its Attorney General, and petitions the Court as follows:

1. The jurisdiction of the Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States. The Court's jurisdiction in this case is exclusive. 28 U.S.C. § 1251(a).

2. The Republican River ("Republican") is an interstate river rising in the plains of northeastern Colorado, northwestern Kansas, and southwestern Nebraska, flowing east through southern Nebraska,

roughly parallel to the Kansas-Nebraska stateline, past Guide Rock, Nebraska ("Guide Rock"), and, then, near Hardy, Nebraska ("Hardy"), turning south into Kansas, where it joins the Smoky Hill River to form the Kansas River, which flows east through Topeka to Kansas City, where it in turn joins the Missouri River. See map in App. 1 to Brief in Support. The Republican is a major source of water supply for Kansas.

3. The waters of the Republican were equitably apportioned among Colorado, Kansas and Nebraska ("States") by the Republican River Compact ("Compact" or "RRC"), reprinted as Appendix A to this Petition. The Compact was negotiated pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States and pursuant to the specific consent of Congress in the Act of August 4, 1942, 56 Stat. 736. The Compact was entered into on the basis of an agreement reached by the States on December 31, 1942, which was subsequently ratified by the state legislatures: Colorado by Act of March 15, 1943 (Colo. Rev. Stat. §§ 37-67-101, 102 (2009)); Kansas by Act of February 22, 1943 (Kan. Stat. Ann. § 82a-518 (1997)); and Nebraska by Act of February 24, 1943 (Neb. Rev. Stat. Vol. 2a, App. 1-106 (1995)). Congress consented to the Compact, and President Roosevelt approved it on May 26, 1943. 57 Stat. 86.

4. After Compact approval, the Federal Government proceeded to construct water projects in the Republican Basin ("Basin"). As a result, the waters of the Basin are impounded by nine dams constructed

and operated by the Federal Government for flood control, irrigation and other purposes.

5. The Compact imposes limits in each Republican sub-basin on the beneficial consumptive use of water by each of the States, and further provides that Kansas is entitled to divert all or any portion of its mainstem share of the Republican waters at or near Guide Rock. RRC, Art IV, ¶ 4, reprinted in App. A, at A7. In reliance on Article IV of the Compact, the U.S. Bureau of Reclamation ("Reclamation") constructed the Bostwick Division Project, which stores water in Harlan County Lake behind the U.S. Army Corps of Engineers' ("Corps") Harlan County Dam in Harlan County, Nebraska for irrigation use in both Nebraska and Kansas. The Bostwick Division Project allows Kansas' share of the stored waters to be diverted at Guide Rock for delivery through the Courtland Canal to irrigators in the Kansas Bostwick Irrigation District. Mainstem waters allocated to Kansas by the Compact that are not diverted through the Courtland Canal are to be delivered in the mainstem of the Republican where it crosses into Kansas near Hardy. See maps in Apps. 1 and 2 to Brief in Support.

6. The Republican River Compact Administration ("RRCA") was established by regulations adopted by the States in 1959 pursuant to Article IX of the Compact. RRCA, First Annual Report (1961). The RRCA is composed of three commissioners, one from each state. Actions of the RRCA must be unanimous. See RRC, art. IX, reprinted in App. A, at A11; RRCA

Rules and Regulations, Rules 1 and 11 (rev. 1/12/05), RRCA, 44th Annual Report (2005).

7. Beginning in the 1980s and continuing into the 1990s, Kansas complained to the RRCA that Nebraska's increasing groundwater development was causing violations of the Compact. See, *e.g.*, RRCA, 25th Annual Report 7 (1985). Nebraska took little action to address Kansas' complaints.

8. The primary cause of Nebraska's violations was the steadily increasing number of wells and amount of groundwater pumping for irrigation in the Basin since the adoption of the Compact. The increased pumping caused Nebraska to exceed the consumptive use limits imposed by Article IV of the Compact.

9. Nebraska's increased groundwater pumping in the 1980s and 1990s escalated Nebraska's consumption of water, which in turn depleted the flows of the Republican and its tributaries on which Kansas and its water users depend for their life and livelihood. The physical process by which Republican surface water flows are depleted by Nebraska groundwater pumping is explained in the Statement of Kansas Chief Engineer David W. Barfield ("Statement"), which is Appendix C to this Petition.

10. From 1995 to 1997, Kansas and Nebraska engaged in 16 months of unsuccessful mediated negotiations to resolve the conflict.

11. Kansas filed its Motion for Leave to File Bill of Complaint in this Court in 1998. The motion was granted, and Nebraska was allowed to file a motion to dismiss. Nebraska's Motion to Dismiss was based on its position that the Compact did not require accounting of the effects of groundwater pumping on the Republican. On the basis of the First Report of Special Master Vincent L. McKusick, the Court denied the Motion to Dismiss. *Kansas v. Nebraska & Colorado,* 530 U.S. 1272 (2000).

12. After denial of Nebraska's Motion to Dismiss and more than a year of additional work and settlement negotiations, the States, with the specific approval of their Governors and Attorneys General, entered into the Final Settlement Stipulation ("FSS"), which was approved by the Court in its Decree ("Decree") of May 19, 2003. *Kansas v. Nebraska & Colorado,* 538 U.S. 720 (2003). The Decree and FSS are reprinted in Appendix B to this Petition. Pursuant to the FSS, the RRCA Groundwater Model was completed and agreed to by the States following six additional months of work and negotiations by the States' technical experts. See Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model (September 17, 2003), 540 U.S. 964 (2003) (Report and Certificate received and ordered filed).

13. Nebraska is bound by the Decree.

14. Colorado is also bound by the Decree, but no relief is sought against Colorado in this Petition.

Kansas reserves the right, however, to seek relief at a later time against Colorado for its violations of the Decree.

15. The FSS consists of five volumes containing 42 pages of text, and over a thousand pages of appendices, together with a DVD containing the electronic version of the RRCA Groundwater Model and related electronic files. The FSS contains detailed provisions implementing the Compact and resolving many details of Compact interpretation that otherwise would likely have been the subject of litigation among the States. The FSS and all of its appendices are posted on the Court's website.

16. Under the FSS, Nebraska's compliance requirements include, among others: (1) a five-year running average test requiring statewide beneficial consumptive use to be no more than Nebraska's statewide allocation; and (2) during water-short periods ("Water-Short Year Administration"), an additional two- or three-year running average test requiring Nebraska's beneficial consumptive use above Guide Rock to be not more than Nebraska's allocation above Guide Rock and Nebraska's share of any unused portion of Colorado's allocation. Each and every year, Nebraska is required by the Decree to comply with one or more of the tests set forth in the FSS. See App. B, at B36, B42-43.

17. There is no central state administration of groundwater pumping in Nebraska. Instead, local natural resources districts, governed by the water

users themselves, control groundwater pumping with little supervision by the State of Nebraska. This system, as it currently exists, has proven inadequate to achieve compliance with the Decree.

18. Notwithstanding the entry of the Decree, Nebraska has allowed the number of acres irrigated with groundwater to increase even beyond the acres irrigated when the Decree was entered. See Statement, Fig. 5. While Nebraska groundwater pumping can vary significantly from year to year because of natural variations in precipitation and other climatic factors, the peak pumping during each succeeding dry period has continued to grow even since the filing of Kansas' Bill of Complaint in 1998. After an unprecedented high in the amount of irrigation pumping in 2002, a drought year, Nebraska pumping has dropped somewhat during the recent wet years. Other than in the abnormally wet years of 2007-2009, Nebraska pumping has generally remained at or above the pumping levels that drove the filing of the Kansas Bill of Complaint in 1998. See *id.*, Figs. 4, 6. As a result, the long-term trend of increasing depletions of the Republican has continued since the entry of the Decree. These depletions will continue to increase into the future, further complicating Nebraska's ability to comply, and threatening continued and increasing interference with Kansas' future allocations, especially during dry periods. See *id.*, Fig. 7.

19. Specifically, in violation of the Decree, the State of Nebraska did not limit its beneficial

consumptive use above Guide Rock to its allocation above Guide Rock during 2005 and 2006, the first Water-Short Year accounting period. Nebraska overused its allocation above Guide Rock during 2005 and 2006 by a total of approximately 79,000 acre-feet. Nebraska does not dispute the fact that it exceeded its allocations above Guide Rock in 2005 and 2006 by a total of at least 71,000 acre-feet. *Id.*, § 19.

20. Even by Nebraska's reckoning, the amount of the violation averaged over 35,000 acre-feet per year in 2005 and 2006. This is over three times the violation of the Pecos River Compact by New Mexico, as found by the Court. See *Texas v. New Mexico*, 482 U.S. 124, 127 (1987) (10,000 acre-feet per year). It is also more than three times Colorado's violation of the Arkansas River Compact, as found by the Court. See *Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (9,000 acre-feet per year). In terms of municipal water use in Kansas, the amount of Nebraska's violation is more than the annual consumptive use of a city of a half million people. Statement, § 20.

21. Nebraska has profited from violating the Decree and proposes to retain those profits. Unless restrained by this Court, Nebraska will undoubtedly continue to violate the Court's Decree and retain profits derived therefrom.

22. Kansas and its water users have been damaged by Nebraska's violation of the Compact and the Decree and will continue to suffer damage in the future if Nebraska is not restrained by this Court.

23. Kansas has complied with all requirements of the Decree.

24. As a result of Nebraska's violations of the Compact and the Decree, Kansas has suffered irreparable injury.

25. Kansas has no adequate remedy at law to enforce its rights under the Decree.

26. Considering the balance of hardships between Kansas and Nebraska, a remedy in equity enforcing the Decree is warranted.

27. Specific actions or their equivalent must be taken by Nebraska in light of Nebraska's demonstrated inability or unwillingness to comply with the Compact and the Court's Decree. It would be appropriate for the Court to specifically order the necessary actions, and the public interest would not be disserved thereby.

28. This Court is the sole forum in which Kansas may enforce its rights under the Compact and the Decree.

WHEREFORE, Kansas prays that Nebraska:

1. Be ordered to show cause why it should not be held in contempt of this Court for violating the Decree;

2. Be adjudged in contempt of this Court for violating the Decree;

3. Be enjoined from further violations of the Decree;

4. Be ordered to pay over the amount of its profits or the amount of Kansas' losses resulting from Nebraska's violation, whichever is greater, together with pre- and post-judgment interest;

5. Be ordered to pay preset sanctions in the event of future violations in an amount sufficient to remove the incentive for Nebraska to violate the Decree;

6. Be ordered to reduce groundwater pumping, or to take other specific and equivalent actions, by a date certain, sufficient to ensure Decree compliance in the future;

7. Be made subject to a river master appointed by the Court to actively monitor and ensure Nebraska's compliance, each and every year, with the Decree, on the Court's behalf;

8. Be ordered to undertake such alternative or additional actions as the Court may deem just and equitable to the States under the circumstances; and

9. Be ordered to pay Kansas' costs and expenses, including attorney's fees.

Respectfully submitted,

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Attorney General of Kansas

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May 2010

APPENDIX A

The Republican River Compact as
Enacted by Congress
57 Stat. 86 (1943)

AN ACT

To grant the consent of Congress to a compact entered into by the States of Colorado, Kansas, and Nebraska relating to the Waters of the Republican River Basin, to make provisions concerning the exercise of Federal jurisdiction as to those waters, to promote flood control in the Basin, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact authorized by the Act entitled "An Act granting the consent of Congress to the States of Colorado, Kansas, and Nebraska to negotiate and enter into a compact for the division of the waters of the Republican River", approved August 4, 1942. (Public Law 696, Seventy-seventh Congress; 56 Stat. 736), signed by the commissioners for the States of Colorado, Kansas, and Nebraska at Lincoln, Nebraska, on December 31, 1942, and thereafter ratified by the Legislatures of the States of Colorado, Kansas, and Nebraska, which compact reads as follows:

"REPUBLICAN RIVER COMPACT

"The States of Colorado, Kansas, and Nebraska, parties signatory to this compact (hereinafter referred to as Colorado, Kansas, and Nebraska, respectively, or individually as a State, or collectively as the States), having resolved to conclude a compact with respect to the waters of the Republican River Basin, and being duly authorized therefor by the Act of the Congress of the United States of America, approved August 4, 1942, (Public No. 696, 77th Congress, Chapter 545, 2nd Session) and pursuant to Acts of their respective Legislatures have, through their respective Governors, appointed as their Commissioners:

M.C. Hinderlider, for Colorado
George S. Knapp, for Kansas
Wardner G. Scott, for Nebraska

who, after negotiations participated in by Glenn L. Parker, appointed by the President as the Representative of the United States of America, have agreed upon the following articles:

"Article I

"The major purposes of this compact are to provide for the most efficient use of the waters of the Republican River Basin (hereinafter referred to as the 'Basin') for multiple purposes; to provide for an equitable division of such waters; to remove all causes, present and future, which might lead to controversies; to promote interstate comity; to recognize

that the most efficient utilization of the waters within the Basin is for beneficial consumptive use; and to promote joint action by the States and the United States in the efficient use of water and the control of destructive floods.

"The physical and other conditions peculiar to the Basin constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes that this compact establishes any general principle or precedent with respect to any other interstate stream.

"Article II

"The Basin is all the area in Colorado, Kansas, and Nebraska, which is naturally drained by the Republican River, and its tributaries, to its junction with the Smoky Hill River in Kansas. The main stem of the Republican River extends from the junction near Haigler, Nebraska, of its North Fork and the Arikaree River, to its junction with Smoky Hill River near Junction City, Kansas. Frenchman Creek (River) in Nebraska is a continuation of Frenchman Creek (River) in Colorado. Red Willow Creek in Colorado is not identical with the stream having the same name in Nebraska. A map of the Basin approved by the Commissioners is attached and made a part hereof.

"The term 'Acre-foot', as herein used, is the quantity of water required to cover an acre to the depth of one foot and is equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet.

"The term 'Virgin Water Supply', as herein used, is defined to be the water supply within the Basin undepleted by the activities of man.

"The term 'Beneficial Consumptive Use' is herein defined to be that use by which the water supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area.

"Beneficial consumptive use is the basis and principle upon which the allocations of water hereinafter made are predicated.

"Article III

"The specific allocations in acre-feet hereinafter made to each State are derived from the computed average annual virgin water supply originating in the following designated drainage basins, or parts thereof, in the amounts shown:

"North Fork of the Republican River drainage basin in Colorado, 44,700 acre-feet;
"Arikaree River drainage basin, 19,610 acre-feet;
"Buffalo Creek drainage basin, 7,890 acre-feet;
"Rock Creek drainage basin, 11,000 acre-feet;
"South Fork of the Republican River drainage basin, 57,200 acre-feet;
"Frenchman Creek (River) drainage basin in Nebraska, 98,500 acre-feet;
"Blackwood Creek drainage basin, 6,800 acre-feet;

"Driftwood Creek drainage basin, 7,300 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 21,900 acre-feet,
"Medicine Creek drainage basin, 50,800 acre-feet;
"Beaver Creek drainage basin, 16,500 acre-feet;
"Sappa Creek drainage basin, 21,400 acre-feet;
"Prairie Dog Creek drainage basin, 27,600 acre-feet;

"The North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, 87,700 acre-feet.

"Should the future computed virgin water supply of any source vary more than ten (10) per cent from the virgin water supply as hereinabove set forth, the allocations hereinafter made from such source shall be increased or decreased in the relative proportion that the future computed virgin water supply of such source bears to the computed virgin water supply used herein.

"Article IV

"There is hereby allocated for beneficial consumptive use in Colorado, annually, a total of fifty-four thousand, one hundred (54,100) acre-feet of

water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin, 10,000 acre-feet;
"Arikaree River drainage basin, 15,400 acre-feet;
"South Fork of the Republican River drainage basin, 25,400 acre-feet;
"Beaver Creek drainage basin, 3,300 acre-feet; and

"In addition, for beneficial consumptive use in Colorado, annually, the entire water supply of the Frenchman Creek (River) drainage basin in Colorado and of the Red Willow Creek drainage basin in Colorado.

"There is hereby allocated for beneficial consumptive use in Kansas, annually, a total of one hundred ninety thousand, three hundred (190,300) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"Arikaree River drainage basin, 1,000 acre-feet;
"South Fork of the Republican River drainage basin, 23,000 acre-feet;
"Driftwood Creek drainage basin, 500 acre-feet;

"Beaver Creek drainage basin, 6,400 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 12,600 acre-feet;

"From the main stem of the Republican River upstream from the lowest crossing of the river at the Nebraska-Kansas state line and from water supplies of upstream basins otherwise unallocated herein, 138,000 acre-feet; provided, that Kansas shall have the right to divert all or any portion thereof at or near Guide Rock, Nebraska; and

"In addition there is hereby allocated for beneficial consumptive use in Kansas, annually, the entire water supply originating in the Basin downstream from the lowest crossing of the river at the Nebraska-Kansas state line.

"There is hereby allocated for beneficial consumptive use in Nebraska, annually, a total of two hundred thirty-four thousand, five hundred (234,500) acre-feet of water. This total is to be derived from the sources and in the amounts hereinafter specified and is subject to such quantities being physically available from those sources:

"North Fork of the Republican River drainage basin in Colorado, 11,000 acre-feet;
"Frenchman Creek (River) drainage basin in Nebraska, 52,800 acre-feet;
"Rock Creek drainage basin, 4,400 acre-feet;

"Arikaree River drainage basin, 3,300 acre-feet;
"Buffalo Creek drainage basin, 2,600 acre-feet;
"South Fork of the Republican River drainage basin, 800 acre-feet;
"Driftwood Creek drainage basin, 1,200 acre-feet;
"Red Willow Creek drainage basin in Nebraska, 4,200 acre-feet;
"Medicine Creek drainage basin, 4,600 acre-feet;
"Beaver Creek drainage basin, 6,700 acre-feet;
"Sappa Creek drainage basin, 8,800 acre-feet;
"Prairie Dog Creek drainage basin, 2,100 acre-feet;

"From the North Fork of the Republican River in Nebraska, the main stem of the Republican River between the junction of the North Fork and Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line, from the small tributaries thereof, and from water supplies of up-stream basins otherwise unallocated herein, 132,000 acre-feet.

"The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

"Article V

"The judgment and all provisions thereof in the case of Adelbert A. Weiland, as State Engineer of Colorado, et al, v. The Pioneer Irrigation Company, decided June 5, 1922, and reported in 259 U.S. 498, affecting the Pioneer Irrigation ditch or canal, are hereby recognized as binding upon the States; and Colorado, through its duly authorized officials, shall have the perpetual and exclusive right to control are regulate diversions of water at all times by said canal in conformity with said judgment.

"The water heretofore adjudicated to said Pioneer Canal by the District Court of Colorado, in the amount of fifty (50) cubic feet per second of time is included in and is a part of the total amounts of water hereinbefore allocated for beneficial consumptive use in Colorado and Nebraska.

"Article VI

"The right of any person, entity, or lower State to construct, or participate in the future construction and use of any storage reservoir or diversion works in an upper State for the purpose of regulating water herein allocated for beneficial consumptive use in such lower State, shall never be denied by an upper State; provided, that such right is subject to the rights of the upper State.

"Article VII

"Any person, entity, or lower State shall have the right to acquire necessary property rights in an upper State by purchase, or through the exercise of the power of eminent domain, for the construction, operation and maintenance of storage reservoirs, and of appurtenant works, canals and conduits, required for the enjoyment of the privileges granted by Article VI; provided, however, that the grantees of such rights shall pay to the political subdivisions of the State in which such works are located, each and every year during which such rights are enjoyed for such purposes, a sum of money equivalent to the average annual amount of taxes assessed against the lands and improvements during the ten years preceding the use of such lands, in reimbursement for the loss of taxes to said political subdivisions of the State.

"Article VIII

"Should any facility be constructed in an upper State under the provisions of Article VI, such construction and the operation of such facility shall be subject to the laws of such upper State.

"Any repairs to or replacements of such facility shall also be made in accordance with the laws of such upper State.

"Article IX

"It shall be the duty of the three States to administer this compact through the official in each State who is now or may hereafter be charged with the duty of administering the public water supplies, and to collect and correlate through such officials the data necessary for the proper administration of the provisions of this compact. Such officials may, by unanimous action, adopt rules and regulations consistent with the provisions of this compact.

"The United States Geological Survey, or whatever federal agency may succeed to the functions and duties of that agency, insofar as this compact is concerned, shall collaborate with the officials of the States charged with the administration of this compact in the execution of the duty of such officials in the collection, correlation, and publication of water facts necessary for the proper administration of this compact.

"Article X

"Nothing in this compact shall be deemed:

"(a) To impair or affect any rights, powers or jurisdiction of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin; nor to impair or affect the capacity of the United States, or those acting by or under its authority, to acquire rights in and to the use of waters of the Basin;

"(b) To subject any property of the United States, its agencies or instrumentalities, to taxation by any State, or subdivision thereof, nor to create an obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, state agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

"(c) To subject any property of the United States, its agencies or instrumentalities, to the laws of any State to any extent other than the extent these laws would apply without regard to this compact.

"Article XI

"This compact shall become operative when ratified by the Legislature of each of the States, and when consented to by the Congress of the United States by legislation providing, among other things, that:

"(a) Any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be made within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.

"(b) The United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of this compact and after consultation with all interested federal agencies and the state officials charged with the administration of this compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

"(c) The United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by this compact which may be impaired by the exercise of federal jurisdiction in, over, and to such waters; provided, that such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with this compact at the time of the impairment thereof, and was validly initiated under state law prior to the initiation or authorization of the federal program or project which causes such impairment.

"IN WITNESS WHEREOF, the Commissioners have signed this compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the States.

"Done in the City of Lincoln, in the State of Nebraska, on the 31st day of December, in the year of our Lord, one thousand nine hundred forty-two.

"M. C. HINDERLIDER
"Commissioner for Colorado
"GEORGE S. KNAPP
"Commissioner for Kansas
"WARDNER G. SCOTT
"Commissioner for Nebraska

"I have participated in the negotiations leading to this proposed compact and propose to report to the Congress of the United States favorably thereon.

"GLENN L. PARKER
"Representative of the United States"

Sec. 2(a) In order that the conditions stated in article XI of the compact hereby consented to shall be met and that the compact shall be and continue to be operative, the following provisions are enacted –

(1) any beneficial consumptive uses by the United States, or those acting by or under its authority, within a State, of the waters allocated by such compact, shall be made within the allocations made by such compact for use in that State and shall

be taken into account in determining the extent of use within that State;

(2) the United States, or those acting by or under its authority, in the exercise of rights or powers arising from whatever jurisdiction the United States has in, over, and to the waters of the Basin shall recognize, to the extent consistent with the best utilization of the waters for multiple purposes, that beneficial consumptive use of the waters within the Basin is of paramount importance to the development of the Basin; and no exercise of such power or right thereby that would interfere with the full beneficial consumptive use of the waters within the Basin shall be made except upon a determination, giving due consideration to the objectives of such compact and after consultation with all interested Federal agencies and the State officials charged with the administration of such compact, that such exercise is in the interest of the best utilization of such waters for multiple purposes.

(3) the United States, or those acting by or under its authority, will recognize any established use, for domestic and irrigation purposes, of the waters allocated by such compact which may be impaired by the exercise of Federal jurisdiction in, over, and to such waters: *Provided*, That such use is being exercised beneficially, is valid under the laws of the appropriate State and in conformity with such compact at the time of the impairment thereof, and was validly initiated under State law prior to the

initiation or authorization of the Federal program or project which causes such impairment.

(b) As used in this section –

(1) "beneficial consumptive uses" has the same meaning as when used in the compact consented to by Congress by this Act; and

(2) "Basin" refers to the Republican River Basin as shown on the map attached to and made a part of the original of such compact deposited in the archives of the Department of State.

Approved May 26, 1943.

APPENDIX B

OCTOBER TERM, 2002

Decree

KANSAS v. NEBRASKA

ON BILL OF COMPLAINT

No. 126, Orig. Decree entered May 19, 2003

The Final Report of the Special Master is received and ordered filed.

DECREE

This cause, having come to be heard on the Second Report of the Special Master appointed by this Court, and on the Parties' Joint Motion for Approval of Final Settlement Stipulation, which accompanies said Report, IT IS HEREBY ORDERED THAT:

1. The Final Settlement Stipulation executed by all of the parties to this case and filed with the Special Master on December 16, 2002, is approved;

2. This action is recommitted to the Special Master for the sole purpose of deciding procedural questions arising in the completion by the state parties of the RRCA Groundwater Model pursuant to the binding procedures prescribed by the Final Settlement Stipulation. All claims, counterclaims, and cross-claims for which leave to file was or could have been sought in this case arising prior to December 15, 2002, are hereby dismissed with prejudice effective

upon the filing by the Special Master of a final report certifying adoption of the RRCA Groundwater Model by the state parties.

B3

No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BEFORE THE HONORABLE
VINCENT L. MCKUSICK
SPECIAL MASTER

FINAL SETTLEMENT STIPULATION
VOLUME 1 OF 5

December 15, 2002

VOLUME 1

FINAL SETTLEMENT STIPULATION 1

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FINAL SETTLEMENT STIPULATION

The States of Kansas, Nebraska and Colorado, hereby enter into this Final Settlement Stipulation as of December 15, 2002:

I. General

A. The States agree to resolve the currently pending litigation in the United States Supreme Court regarding the Republican River Compact by means of this Stipulation and the Proposed Consent Judgment attached hereto as Appendix A.

B. The States agree to undertake the obligations set forth in this Stipulation. The States shall implement the obligations and agreements in this Stipulation in accordance with the schedule attached hereto as Appendix B.

C. Upon the Court's approval of this Stipulation and entry of the Proposed Consent Judgment, the States agree that all claims against each other relating to the use of the waters of the Basin pursuant to the Compact with respect to activities or conditions occurring before December 15, 2002, shall be waived, forever barred and dismissed with prejudice. These claims shall include all claims for Compact violations, damages, and all claims asserted or which could have been asserted in the pending proceeding, No. 126, Original.

D. With respect to activities or conditions occurring after December 15, 2002, the dismissal will not preclude a State from seeking enforcement of the provisions of the Compact, this Stipulation and the Proposed Consent Judgment. Nor will the dismissal preclude any State in such future action from asserting any legal theories it raised in the present proceeding, or any other legal theories, with respect to activities or conditions occurring after the date of such dismissal. The States agree that this Stipulation and the Proposed Consent Judgment are not intended to, nor could they, change the States' respective rights and obligations under the Compact. The States reserve their respective rights under the Compact to raise any issue of Compact interpretation and enforcement in the future.

E. Specific information-sharing requirements are set forth in the RRCA Accounting Procedures, attached hereto as Appendix C. The States will provide each other with the opportunity to inspect and copy their records pertaining to water use in the Basin, other than privileged materials, upon request. The States will cooperate in arranging verification as reasonably necessary.

F. The RRCA may modify the RRCA Accounting Procedures, or any portion thereof, in any manner consistent with the Compact and this Stipulation.

G. Headings in this Stipulation are provided for convenience only and shall not affect the substance of any provision.

H. This Stipulation supersedes the Settlement Principles signed by the States on April 30, 2002.

I. The provisions of Subsection IV.C. relating to the development of the RRCA Groundwater Model shall be in effect and enforceable between December 15, 2002 and July 1, 2003 or until the Court's approval or disapproval of this Stipulation, whichever is later.

J. Within six months of the final dismissal of this case, the RRCA shall revise its existing rules and regulations as necessary to make them consistent with this Stipulation and the RRCA Accounting Procedures.

II. Definitions

Wherever used in this Stipulation the following terms are defined as:

Acre-foot: The quantity of water required to cover an acre to the depth of one foot, equivalent to forty-three thousand, five hundred sixty (43,560) cubic feet;

Actual Interest: A State will be deemed to have an actual interest in a dispute if resolution of the dispute could require action by the State, result in increasing or decreasing the amount of water available to a State, affect the State's ability to monitor or administer water use or water

availability, or increase the State's financial obligations;

Addressed by the RRCA: A matter is deemed to be addressed by the RRCA when the RRCA has taken final action by vote on such request or failed to take action by vote on the request after a Reasonable Opportunity to investigate and act on the request;

Allocation(s): The water supply allocated to each State from the Computed Water Supply;

Annual: As defined in the RRCA Accounting Procedures Section II;

Basin: Republican River Basin as defined in Article II of the Republican River Compact;

Beneficial Consumptive Use: That use by which the Water Supply of the Basin is consumed through the activities of man, and shall include water consumed by evaporation from any reservoir, canal, ditch, or irrigated area;

Compact: The Republican River Compact, Act of February 22, 1943, 1943 Kan. Sess. Laws 612, codified at Kan. Stat. Ann. § 82a-518 (1997); Act of February 24, 1943, 1943 Neb. Laws 377, codified at 2A Neb. Rev. Stat. App. § 1-106 (1995), Act of March 15, 1943, 1943 Colo. Sess. Laws 362, codified at Colo. Rev. Stat. §§ 37-67-101 and 37-67-102 (2001); Republican River Compact, Act of May 26, 1943, ch. 104, 57 Stat. 86;

Computed Beneficial Consumptive Use: The stream flow depletion resulting from the activities of man as listed in the definition of

Computed Beneficial Consumptive Use in the RRCA Accounting Procedures Section II;

Computed Water Supply: As defined in the RRCA Accounting Procedures Section II;

Conservation Committee: The conservation measures study committee established in Subsection VI.B.1;

Court: The United States Supreme Court;

Designated Drainage Basins: The drainage basins of the specific tributaries and Main Stem of the Republican River as described in Article III of the Compact;

Dewatering Well: A Well constructed solely for the purpose of lowering the groundwater elevation;

Federal Reservoirs: Bonny Reservoir, Swanson Lake, Enders Reservoir, Hugh Butler Lake, Harry Strunk Lake, Keith Sebelius Lake, Harlan County Lake, Lovewell Reservoir;

Flood Flows: The amount of water deducted from the Virgin Water Supply as part of the computation of the Computed Water Supply due to a flood event as determined by the methodology described in the RRCA Accounting Procedures, Subsection III.B.1.;

Guide Rock: A point at the Superior-Courtland Diversion Dam on the Republican River near Guide Rock, Nebraska; the Superior-Courtland Diversion Dam gage plus any flows through the sluice gates of the dam, specifically excluding any

diversions to the Superior and Courtland Canals, shall be the measure of flows at Guide Rock;

Historic Consumptive Use: That amount of water that has been consumed under appropriate and reasonably efficient practices to accomplish without waste the purposes for which the appropriation or other legally permitted use was lawfully made;

Imported Water Supply: The water supply imported by a State from outside the Basin resulting from the activities of man;

Imported Water Supply Credit: The accretions to stream flow due to water imports from outside of the Basin as computed by the RRCA Groundwater Model. The Imported Water Supply Credit of a State shall not be included in the Virgin Water Supply and shall be counted as a credit/offset against the Computed Beneficial Consumptive Use of that State's Allocation, except as provided in Subsection V.B.2. of this Stipulation and Subsections III.I. – J. of the RRCA Accounting Procedures;

Main Stem: The Designated Drainage Basin identified in Article III of the Compact as the North Fork of the Republican River in Nebraska and the main stem of the Republican River between the junction of the North Fork and the Arikaree River and the lowest crossing of the river at the Nebraska-Kansas state line and the small tributaries thereof, and also including the drainage basin Blackwood Creek;

Main Stem Allocation: The portion of the Computed Water Supply derived from the Main Stem and the Unallocated Supply derived from the Sub-basins as shared by Kansas and Nebraska;

Modeling Committee: The joint groundwater modeling committee established in Subsection IV.C.;

Moratorium: The prohibition and limitations on construction of new Wells in the geographic area described in Section III;

Non-Federal Reservoirs: Reservoirs other than Federal Reservoirs that have a storage capacity of 15 Acre-feet or greater at the principal spillway elevation;

Northwest Kansas: Those portions of the Sub-basins within Kansas;

Proposed Consent Judgment: The document attached hereto as Appendix A;

Reasonable Opportunity: The RRCA will be deemed to have had a reasonable opportunity to investigate and act on a regular request when, at a minimum, the issue has been discussed at the next regularly scheduled annual meeting. If the RRCA agrees that an issue requires additional investigation, the RRCA may specify a period of time that constitutes a reasonable opportunity for completion of such investigation and final action on the particular issue. The RRCA will be deemed to have had a reasonable opportunity to investigate and act on a "fast-track" request when the issue has been discussed at a meeting

of the RRCA no later than 30 days after the "fast-track" issue has been raised. If the RRCA agrees that a "fast track" issue requires additional investigation, the RRCA may specify a period of time that constitutes a reasonable opportunity for completion of such investigation and final action on the particular issue;

Replacement Well: A Well that replaces an existing Well that a) will not be used after construction of the new Well and b) will be abandoned within one year after such construction or is used in a manner that is excepted from the Moratorium described in Subsections III.B.1.c.- f. of this Stipulation;

RRCA: The Republican River Compact Administration, the administrative body composed of the State officials identified in Article IX of the Compact;

RRCA Accounting Procedures: The document titled "The Republican River Compact Administration Accounting Procedures and Reporting Requirements" and all attachments thereto, attached hereto as Appendix C;

RRCA Groundwater Model: The groundwater model developed under the provisions of Subsection IV.C. of this Stipulation;

State: Any of the States of Colorado, Kansas and Nebraska;

States: The States of Colorado, Kansas and Nebraska;

Stipulation: This Final Settlement Stipulation to be filed in *Kansas v. Nebraska and Colorado*, No. 126, Original, including all Appendices attached hereto;

Sub-basin: Any of the Designated Drainage Basins, except for the Main Stem, identified in Article III of the Compact;

Submitted to the RRCA: A matter is deemed to have been submitted to the RRCA when a written statement requesting action or decision by the RRCA has been delivered to the other RRCA members by a widely accepted means of communication and receipt has been confirmed;

Test hole: A hole designed solely for the purposes of obtaining information on hydrologic and/or geologic conditions;

Trenton Dam: The dam located at 40 degrees, 10 minutes, 10 seconds latitude and 101 degrees, 3 minutes, 35 seconds longitude, approximately two and one-half miles west of the town of Trenton, Nebraska;

Unallocated Supply: The "water supplies of upstream basins otherwise unallocated" as set forth in Article IV of the Compact;

Upstream of Guide Rock, Nebraska: Those areas within the Basin lying west of a line proceeding north from the Nebraska-Kansas state line and following the western edge of Webster County, Township 1, Range 9, Sections 34, 27, 22, 15, 10 and 3 through Webster County, Township 2, Range 9, Sections 34, 27 and 22; then proceeding west along the southern edge of

Webster County, Township 2, Range 9, Sections 16, 17 and 18; then proceeding north following the western edge of Webster County, Township 2, Range 9, Sections 18, 7 and 6, through Webster County, Township 3, Range 9, Sections 31, 30, 19, 18, 7 and 6 to its intersection with the northern boundary of Webster County. Upstream of Guide Rock, Nebraska shall not include that area in Kansas east of the 99° meridian and south of the Kansas-Nebraska state line. Attached to this Stipulation in Appendix D is a map that shows the areas upstream of Guide Rock, Nebraska. In the event of any conflict between this definition and Appendix D, this definition will control;

Virgin Water Supply: The Water Supply within the Basin undepleted by the activities of man.

Water Supply of the Basin or **Water Supply within the Basin**: The stream flows within the Basin, excluding Imported Water Supply;

Well: Any structure, device or excavation for the purpose or with the effect of obtaining groundwater for beneficial use from an aquifer, including wells, water wells, or groundwater wells as further defined and used in each State's laws, rules, and regulations.

III. Existing Development

A. Moratorium on New Wells

1. Except as provided below, the States hereby adopt a prohibition on the construction of all new Wells in the Basin upstream of Guide Rock, Nebraska (hereinafter "Moratorium").

The Moratorium may be modified, in whole or in part, by the RRCA if it determines that new information demonstrates that additional groundwater development in all or any part of the Basin that is subject to the Moratorium would not cause any State to consume more than its Allocations from the available Virgin Water Supply as calculated pursuant to Section IV of this Stipulation. New information shall mean results from the RRCA Groundwater Model or any other appropriate information. Attached hereto in Appendix E, are such laws, rules and regulations in Nebraska concerning the prohibition on construction of new Wells in the Basin.

2. Nothing in this Stipulation, and specifically this Subsection III.A., shall extend the Moratorium or create an additional Moratorium in any of the States in any other river basin or in any other groundwater supply located outside of the Basin.

3. Notwithstanding the provision in Subsection III.A.1. of this Stipulation permitting the RRCA to modify the prohibition on construction of new Wells, the States will not increase the level of development of Wells as of July 1, 2002 in the following Designated Drainage Basins,

subject to the exceptions set forth in Subsection III.B.1-2.:

North Fork of the Republican River in Colorado
Arikaree River
South Fork of the Republican River
Buffalo Creek
Rock Creek
That portion of the North Fork and Main Stem of the Republican River in Nebraska that lies upstream of Trenton Dam.

Any of the States may seek to amend this provision of this Stipulation by making application to the Court upon any change in conditions making modification of this Subsection III.A.3. necessary or appropriate.

B. Exceptions to Moratorium on New Wells

1. The Moratorium shall not apply to the following:

a. Any and all Wells in the Basin located within the current boundaries of the following Natural Resource Districts in Nebraska:

i. The Tri-Basin Natural Resource District;

ii. The Twin Platte Natural Resource District; and

iii. The Little Blue Natural Resource District.

Attached to this Stipulation in Appendix D is a map that shows the areas described in this Subsection III.B.1.a. In the event of any conflict between this Subsection and Appendix D, this Subsection will control;

b. Any and all Wells in the Basin in Nebraska located in the following described areas:

i. Lincoln County, Township 9, Range 27, Sections 5-7;

ii. Lincoln County, Township 9, Range 28, Sections 1-23, 28-30;

iii. Lincoln County, Township 9, Range 29, Sections 1-18, 21-26;

iv. Lincoln County, Township 9, Range 30, Sections 1-6, 8-13;

v. Lincoln County, Township 9, Range 31, Sections 1-2;

vi. Lincoln County, Township 10, Range 27, Sections 19-24, 27-33;

vii. Lincoln County, Township 10, Range 28, Sections 1-36;

viii. Lincoln County, Township 10, Range 29, Sections 1-36;

ix. Lincoln County, Township 10, Range 30, Sections 1-36;

x. Lincoln County, Township 10, Range 31, Sections 1-18, 20-27 and 34-36;

xi. Lincoln County, Township 10, Range 32, Sections 1-4 and 10-13;

xii. Lincoln County, Township 11, Range 28, Sections 28-35;

xiii. Lincoln County, Township 11, Range 29, Sections 19-36;

xiv. Lincoln County, Township 11, Range 30, Sections 19-36;

xv. Lincoln County, Township 11, Range 31, Sections 19-36;

xvi. Lincoln County, Township 11, Range 32, Sections 19-36;

xvii. Lincoln County, Township 11, Range 33, Sections 19-30, 32-36;

xviii. Lincoln County, Township 11, Range 34, Sections 21-27;

xix. Frontier County, Township 6, Range 24, Sections 1-36;

xx. Frontier County, Township 7, Range 24, Sections 1-36; and,

xxi. Frontier County, Township 8, Range 24, Sections 19-21 and 27-36.

Attached to this Stipulation in Appendix D is a map that shows the areas described in this Subsection III.B.1.b. In the event of any conflict between this Subsection and Appendix D, this Subsection will control.

c. Test holes;

d. Dewatering Wells with an intended use of one year or less;

e. Wells designed and constructed to pump fifty gallons per minute or less, provided that no two or more Wells that pump fifty gallons per minute or less may be connected or otherwise combined to serve a single project such that the collective pumping would exceed fifty gallons per minute;

f. Wells designed and constructed to pump 15 Acre-feet per year or less, provided that no two or more Wells that pump 15 Acre-feet per year or less may be connected or otherwise combined to serve a single project

such that the collective pumping would exceed 15 Acre-feet per year;

g. Replacement Wells, subject to all limitations or permit conditions on the existing Well, or in the absence of any limitation or permit condition only if the Beneficial Consumptive Use of water from the new Well is no greater than the Historic Consumptive Use of water from the Well it is to replace. Nebraska will calculate Historic Consumptive Use in the manner proposed in Appendix F. Nebraska shall not change its proposed method of calculating Historic Consumptive Use before providing notice to the RRCA;

h. Wells necessary to alleviate an emergency situation involving the provision of water for human consumption or public health and safety;

i. Wells to which a right or permit is transferred in accordance with state law, provided however, that the new Well:

(i) consumes no more water than the Historic Consumptive Use of water under the right or permit that is being transferred; and

(ii) is not a transfer of a right or permit that would cause an increased stream depletion upstream of Trenton Dam.

Nebraska will calculate Historic Consumptive Use in the manner proposed in Appendix F. Nebraska shall not change its proposed method of calculating Historic Consumptive Use before providing notice to the RRCA;

j. Wells for expansion of municipal and industrial uses. Any new Wells for these purposes shall be counted against the State's Allocation and, to the extent a State is consuming its full Allocation, other uses shall be reduced to stay within the State's Allocation; and

k. Wells acquired or constructed by a State for the sole purpose of offsetting stream depletions in order to comply with its Compact Allocations. Provided that, such Wells shall not cause any new net depletion to stream flow either annually or long-term. The determination of net depletions from these Wells will be computed by the RRCA Groundwater Model and included in the State's Computed Beneficial Consumptive Use. Augmentation plans and related accounting procedures

submitted under this Subsection III.B.1.k. shall be approved by the RRCA prior to implementation.

2. The Moratorium shall not apply to nor create any additional limitations on new Wells in Northwest Kansas and Colorado in the Basin other than those imposed by state laws, rules and regulations in existence as of April 30, 2002. Provided however, that the Historic Consumptive Use of a Well in Colorado or Northwest Kansas that is or would have been accounted for in Compact accounting as a stream depletion reaching the Republican River downstream of Trenton Dam may not be transferred to a Well that would cause a depletion reaching the Republican River upstream of Trenton Dam. Further, neither Colorado nor Kansas shall change their laws, rules or regulations in existence as of April 30, 2002, to the extent that such changes would result in restrictions less stringent than those set forth in Subsection III.B.1. above. Attached hereto in Appendices G and H, respectively, are such laws, rules and regulations in Northwest Kansas and Colorado in existence as of April 30, 2002.

C. Surface Water Limitations

Each of the States has closed or substantially limited its portion of the Basin above Hardy, Nebraska to new surface water rights or permits. Each State agrees to notify each Official Member of the RRCA and the U. S. Bureau of Reclamation at least 60 days prior to a new surface water right or permit being granted or prior to adopting changes to its current restrictions related to granting new surface water rights or permits in the Basin above Hardy, Nebraska and provide the RRCA an opportunity for discussion. Each State, however, reserves the right to allow new surface water rights or permits to use additional surface water if such use can be made within the State's Compact Allocation.

D. Reporting

Beginning on April 15, 2003, or such other date as may be agreed to by the RRCA and on the same date each year thereafter, each State will provide the other States with an annual report for the previous year of all Well construction in the State within the Basin Upstream of Guide Rock, Nebraska and all denials of Well permits or other requests for Well construction. The report shall include such information as required by the RRCA Accounting Procedures, Section V.

IV. Compact Accounting

A. The States will determine Virgin Water Supply, Computed Water Supply, Allocations,

Imported Water Supply Credit, augmentation credit and Computed Beneficial Consumptive Use based on a methodology set forth in the RRCA Accounting Procedures, attached hereto as Appendix C.

B. Water derived from Sub-basins in excess of a State's specific Sub-basin Allocations is available for use by each of the States to the extent that:

1. such water is physically available;

2. use of such water does not impair the ability of another State to use its Sub-basin Allocation within the same Sub-basin;

3. use of such water does not cause the State using such water to exceed its total statewide Allocation; and

4. if Water-Short Year Administration is in effect, such use is consistent with the requirements of Subsection V.B.

C. Determination of stream flow depletions caused by Well pumping and determination of Imported Water Supply Credit will be accomplished by the RRCA Groundwater Model as used in the RRCA Accounting Procedures.

1. Stream flow depletions caused by Well pumping for Beneficial Consumptive Use will be included in the determination of Virgin Water Supply, Computed Water

Supply, Allocations and Computed Beneficial Consumptive Use in accordance with the formulas in the RRCA Accounting Procedures provided that the RRCA may agree to exclude from such accounting minimal stream flow depletions. Stream flow depletions caused by Well pumping for Beneficial Consumptive Use will be counted as Virgin Water Supply and Computed Beneficial Consumptive Use at the time and to the extent the stream flow depletion occurs and will be charged to the State where the Beneficial Consumptive Use occurs.

2. The States agree to devote the necessary time and resources, subject to legislative appropriations, to complete the RRCA Groundwater Model in consultation with the appropriate United States agencies.

3. The States have created a Modeling Committee, comprised of members designated by the States and the United States. Each State may appoint at least one member but no more than three to the Modeling Committee. The United States may designate no more than two representatives to the Modeling Committee. The Modeling Committee shall develop a groundwater model acceptable to the States to accomplish the purposes set forth in this Subsection IV.C. The meetings and other work of the Modeling Committee shall be subject to the Confidentiality Agreement dated

October 19, 2001, signed by the States and the United States, attached hereto as Appendix I.

Nothing in this Stipulation shall be construed as limiting the attendance and observation by non-member representatives of the participants at any meeting of the Modeling Committee or participation by non-members in the independent work of the States and United States representatives.

4. The States and the United States have agreed to freely and immediately share all available data, information, expert knowledge, and other information necessary for the Modeling Committee to complete the modeling work as requested by any member of the Modeling Committee. Data and information is considered to be "available" if it is not otherwise privileged and is (1) used by a State in the modeling process, or (2) is in the possession or control of a State, including its political subdivisions, in the form that the information exists at the time of the request. Data and information "necessary to complete the modeling work" also includes any available information to verify any other data and information. Shared information shall be subject to the Confidentiality Agreement dated October 19, 2001, signed by the States and the United States.

5. If at any time, the members of the Modeling Committee cannot reach agreement on necessary modifications to the RRCA Groundwater Model or any other issues, the Modeling Committee shall report the nature of the dispute to the States promptly and the States shall resolve the dispute as soon as possible.

6. The structure of the RRCA Groundwater Model, together with agreed upon architecture, parameters, procedures and calibration targets as of November 15, 2002, are described in the memorandum attached hereto as Appendix J.

7. The Modeling Committee shall submit the RRCA Groundwater Model to the States in final form with sufficient time for the States to review and agree to the RRCA Groundwater Model by July 1, 2003.

8. Upon agreement by the States to the RRCA Groundwater Model, the States, through the RRCA, shall adopt the RRCA Groundwater Model for purposes of Compact accounting. Following final dismissal of this case, the RRCA may modify the RRCA Groundwater Model or the associated methodologies after discussion with the U.S. Geological Survey.

9. Between December 15, 2002 and July 1, 2003, if the States are unable to agree upon the final RRCA Groundwater Model or if any disputes arise in the

Modeling Committee that the States cannot resolve, the dispute will be submitted to binding expert arbitration for resolution as set forth in this Subsection IV.C.9. No State may invoke binding arbitration unless it has first raised the issue it seeks to have arbitrated in the Modeling Committee and to the States as provided for in Subsection IV.C.5. For purposes of this Subsection IV.C.9., written communications required by this Subsection IV.C.9. shall be provided by both U.S. Mail and by facsimile to both counsel of record and the Official Member of the RRCA for each State and to counsel of record for the United States.

a. Initiation: Any State may invoke binding arbitration by providing written notice to the other States on or before July 1, 2003. A copy of any notice will be provided to the United States at the same time. Notice for the purposes of this Section shall include a written description of the scope of the dispute, with sufficient detail to provide the States with an understanding of the substance of the dispute and all related issues, a description of all attempts to resolve the dispute and sufficient information for the other States to identify the technical skills that should be possessed by potential arbitrators necessary to resolve the

dispute. Upon receipt of notice, each State has five business days to amend the scope of the dispute in writing to address additional issues. If unforeseen issues are identified after the deadline for amending the scope of the dispute, they may be added upon agreement of the States or at the discretion of the arbitrator.

b. Selection: Upon receipt of notice of a dispute, the States shall confer within the deadlines set forth below to choose an arbitrator(s) and the States will in good faith attempt to agree on an arbitrator(s).

   i. Within seven business days of receipt of the initial notice, each State shall submit the names of proposed arbitrators, including qualifications, to the other States. Within seven business days of receipt of the proposed names, the States will meet, in person or by telephone conference, and confer to agree on an arbitrator(s).

   ii. If the States are unable to agree on an arbitrator(s), within seven business days each State will propose an arbitrator(s), not to exceed two and shall submit the proposed names to the other States and the United States in

writing within the time set forth below. Upon receipt of each State's list of proposed arbitrators, within seven business days each State will rank and comment on each proposed arbitrator and submit those comments in writing to the Special Master. The United States, as amicus, may submit rankings and comments to the Special Master. The Special Master will initially eliminate any proposed arbitrators from consideration based upon objections by any State of conflict and/or bias. If all of a State's choices are eliminated by conflict and/or bias, a State may submit the name of an additional arbitrator and each State and the United States may provide comments and objections based on conflict and/or bias within a time limit set by the Special Master.

iii. Any person submitted as a possible arbitrator by any State shall not be an employee or agent of any State, shall be a person knowledgeable in groundwater modeling, and shall disclose any actual or potential conflict of interest and all current or prior contractual and

other relationships with any person or entity who could be directly affected by resolution of the dispute. Any person who has a contractual relationship with any State shall be automatically disqualified for conflict of interest unless the other States expressly agree in writing to submission of that person's name to the Special Master. Any other contested claims of conflict or bias will be resolved by the Special Master.

iv. The Special Master will then choose an arbitrator(s) from the remaining non-conflicted choices.

c. First Arbitration Meeting: Upon selection of an arbitrator(s), the arbitrator(s) shall, within seven business days, hold an initial meeting or conference with the States and the United States, as amicus, to determine a schedule and procedures for exchange of information necessary to resolve the dispute, and for submission and resolution of the pending dispute. The arbitrator(s) may also include disputes arising under Subsection IV.C.4. The arbitrator(s) will be subject to the Confidentiality Agreement dated October 19, 2001, signed by the States and the United States.

d. Costs: The arbitrator(s)' costs shall be paid equally by the States, subject to appropriations by the States' respective legislatures. Each State and the United States, as amicus, shall bear its own costs.

e. Reporting: The arbitrator(s)' decision will be provided to the States and the United States, as amicus, within ten business days of the close of submissions to the arbitrator(s) unless otherwise shortened or extended by agreement of all of the States. The arbitrator(s)' written report of decision and findings will be submitted to the States and the United States, as amicus, within thirty days of providing the arbitrator(s)' decision.

f. Implementation: If the dispute is one involving the ongoing work of the Modeling Committee, the decision of the arbitrator(s) as to the resolution of the dispute shall be implemented by the Modeling Committee and their efforts shall proceed. If the dispute resolves the final RRCA Groundwater Model, the decision of the arbitrator(s) as to the final RRCA Groundwater Model shall be adopted by the RRCA for the purposes of Compact accounting.

D. Except as described in Subsection V.B., all Compact accounting shall be done on a five-year running average in accordance with the provisions of the RRCA Accounting Procedures, attached as Appendix C. Flood flows will be removed as specified in the RRCA Accounting Procedures.

E. The States agree to pursue in good faith, and in collaboration with the United States, system improvements in the Basin, including measures to improve the ability to utilize the water supply below Hardy, Nebraska on the main stem. The States also agree to undertake in collaboration with the United States a system operations study and after completion of the study the States will revisit the five-year running average set forth in Subsection IV.D.

F. Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply. Credit shall be given for any remaining Imported Water Supply that is reflected in increased stream flow, except as provided in Subsection V.B. Determinations of Beneficial Consumptive Use from Imported Water Supply (whether determined expressly or by implication), and any Imported Water Supply Credit shall be calculated in accordance with the RRCA Accounting Procedures and by using the RRCA Groundwater Model.

G. Measurement techniques, data collection and reporting to facilitate implementation of the Stipulation are set forth in the RRCA Accounting Procedures.

H. Augmentation credit, as further described in Subsection III.B.1.k., shall be calculated in accordance with the RRCA Accounting Procedures and by using the RRCA Groundwater Model.

V. Guide Rock

A. Additional Water Administration

1. To provide for regulation of natural flow between Harlan County Lake and Superior-Courtland Diversion Dam, Nebraska will recognize a priority date of February 26, 1948 for Kansas Bostwick Irrigation District, which is the same priority date as the priority date held by the Nebraska Bostwick Irrigation District's Courtland Canal water right.

2. When water is needed for diversion at Guide Rock and the projected or actual irrigation supply is less than 130,000 Acre-feet of storage available for use from Harlan County Lake as determined by the Bureau of Reclamation using the methodology described in the Harlan County Lake Operation Consensus Plan attached as Appendix K to this Stipulation, Nebraska will close junior, and require compliance with senior, natural

flow diversions of surface water between Harlan County Lake and Guide Rock. A description of the implementation of the water administration obligations in this Subsection V.A.2. is attached hereto as Appendix L. The RRCA may modify Appendix L in any manner consistent with this Stipulation and the Compact.

3. Nebraska will protect storage water released from Harlan County Lake for delivery at Guide Rock from surface water diversions.

4. Kansas and Nebraska, in collaboration with the United States, agree to take actions to minimize the bypass flows at Superior-Courtland Diversion Dam. A description of the process for meeting the obligations in this Subsection V.A.4. is attached hereto as Appendix L. The RRCA may modify this process in any manner consistent with this Stipulation and the Compact.

B. Water-Short Year Administration

1. Identification of Water-Short Year Administration:

a. Water-Short Year Administration will be in effect in those years in which the projected or actual irrigation supply is less than 119,000 acre feet of storage available for use from Harlan County Lake as determined by the Bureau of Reclamation

using the methodology described in the Harlan County Lake Operation Consensus Plan. If system operations enhancements below Harlan County Lake increase the useable supply to the Bostwick Irrigation Districts, the trigger for Water-Short Year Administration will be adjusted as agreed to by the States and the United States in order to equitably share the benefits of such enhancements. Following the determination that Water-Short Year Administration is in effect, the States will take the actions described in Subsections V.B.2-4.

b. Each year between October 1 and June 30, the Bureau of Reclamation will provide each of the States with a monthly or, if requested by any one of the States, a more frequent update of the projected or actual irrigation supply from Harlan County Lake for that irrigation season. The determination that Water-Short Year Administration is in effect, pursuant to Subsection V.B.1.a., will become final for that year as of June 30.

2. Nebraska action in Water-Short Year Administration:

a. During Water-Short Year Administration, Nebraska will limit its Computed Beneficial Consumptive

Use above Guide Rock to not more than Nebraska's Allocation that is derived from sources above Guide Rock, and Nebraska's share of any unused portion of Colorado's Allocation (no entitlement to Colorado's unused Allocation is implied or expressly granted by this provision). To accomplish this limitation, Nebraska may use one or more of the following measures:

i. supplementing water for Nebraska Bostwick Irrigation District by providing alternate supplies from below Guide Rock or from outside the Basin;

ii. adjusting well allocations for alluvial Wells above Guide Rock;

iii. adjusting multi-year well allocations for non-alluvial Wells above Guide Rock;

iv. reducing use of storage by Nebraska Bostwick Irrigation District above Guide Rock;

v. dry year leasing of water rights that divert at or above Guide Rock, or;

vi. any other measures that would help Nebraska limit Computed Beneficial Consumptive Use above Guide Rock to not more than that portion of Nebraska's

allocation that is derived from sources above Guide Rock and would (1) produce water above Harlan County Lake; (2) produce water below Harlan County Lake and above Guide Rock that can be diverted during the Bostwick irrigation season; or (3) produce water that can be stored and is needed to fill Lovewell Reservoir.

b. Nebraska may offset any Computed Beneficial Consumptive Use in excess of its Allocation that is derived from sources above Guide Rock with Imported Water Supply Credit. If Nebraska chooses to exercise its option to offset with Imported Water Supply Credit, Nebraska will receive credit only for Imported Water Supply that: (1) produces water above Harlan County Lake; (2) produces water below Harlan County Lake and above Guide Rock that can be diverted during the Bostwick irrigation season; (3) produces water that can be stored and is needed to fill Lovewell Reservoir; or (4) Kansas and Nebraska will explore crediting water that is otherwise useable by Kansas.

c. During Water-Short Year Administration, Nebraska will also limit

its Computed Beneficial Consumptive Use in the Sub-basins to the sum of Nebraska's specific Sub-basin Allocations and 48.9% of the sum of the Unallocated Supply from those same Sub-basins.

d. In years projected to be subject to Water-Short Year Administration, Nebraska will advise the other States and the United States no later than April 30 of measures Nebraska plans to take for that year and the anticipated water yield from those measures. In each Water-Short Year Administration year, Nebraska will advise the other States and the United States no later than June 30 of the measures it has taken or will take for the year and the anticipated water yield from those measures.

e. For purposes of determining Nebraska's compliance with Sub-section V.B.2.:

   i. Virgin Water Supply, Computed Water Supply, Allocations and Computed Beneficial Consumptive Use will be calculated on a two-year running average, as computed above Guide Rock, with any Water-Short Year Administration year treated as the second year of the two-year

running average and using the prior year as the first year; or

ii. as an alternative, Nebraska may submit an Alternative Water-Short Year Administration Plan to the RRCA in accordance with the procedures set forth in Appendix M. The RRCA may modify Appendix M in any manner consistent with this Stipulation and the Compact.

f. If, in the first year after Water-Short Year Administration is no longer in effect, the Compact accounting shows that Nebraska's Computed Beneficial Consumptive Use as calculated above Guide Rock in the previous year exceeded its annual Allocation above Guide Rock, and, for the current year, the expected or actual supply from Harlan County Lake, calculated pursuant to Subsection V.B.1.a., is greater than 119,000 Acre-feet but less than 130,000 Acre-feet, then Nebraska must either make up the entire amount of the previous year's Computed Beneficial Consumptive Use in excess of its Allocation, or the amount of the deficit needed to provide a projected supply in Harlan County Lake of at least 130,000 Acre-feet, whichever is less.

g. If in any month during the year, the projected or actual irrigation supply from Harlan County Lake is equal to or greater than 119,000 Acre-feet, Nebraska may, at its discretion, cease the administrative action called for in this agreement in Subsection V.B.2.a.; provided, however, that any Alternative Water-Short Year Administration Plan shall be subject to the requirements set forth in Appendix M.

3. Colorado action: In those years when Water-Short Year Administration is in effect, Colorado agrees to limit its use of the flexibility identified in Subsection IV.B., to the extent that any portion of Colorado's Allocation from Beaver Creek cannot be used on any other Sub-basin in Colorado.

4. Northwest Kansas action: In those years when Water-Short Year Administration is in effect, Kansas agrees to (1) measure compliance in Northwest Kansas on a two-year average, using the current and the previous year, and (2) limit Computed Beneficial Consumptive Use in the Sub-basins to the sum of Kansas' specific Sub-basin Allocations and 51.1% of the sum of the Unallocated Supply from those same Sub-basins and 51.1% of any unused portion of Colorado's Allocation (no entitlement to Colorado's unused Allocation is implied or expressly

granted by this provision), or determine compliance in such other manner as agreed to by the RRCA.

VI. Soil and Water Conservation Measures

A. For the purposes of Compact accounting the States will calculate the evaporation from Non-Federal Reservoirs located in an area that contributes run-off to the Republican River above Harlan County Lake, in accordance with the methodology set forth in the RRCA Accounting Procedures.

B. In order to attempt to develop information that may allow the States to assess the impacts of Non-Federal Reservoirs and land terracing on the water supply and water uses within the Basin, the States agree to undertake a study, in cooperation with the United States, of the impacts of Non-Federal Reservoirs and land terracing on the Virgin Water Supply.

1. The States, in cooperation with the United States, shall form a committee by January 31, 2003, to be known as the Conservation Committee. By April 30, 2004, the Conservation Committee will:

a. Evaluate the available methods and data relevant to studying the impacts of Non-Federal Reservoirs and land terracing practices on water supplies, including a review of any existing studies and their applicability to the Basin;

b. Determine the general types of data that are available and relevant to the study;

c. Determine the availability of data throughout the Basin, and assess the level of accuracy and precision of the data;

d. Agree on standards for data;

e. Identify additional data necessary to determine the quantitative effects of Non-Federal Reservoirs and land terracing practices on water supply;

f. Propose a methodology for assessing area-capacity relationships for Non-Federal Reservoirs; and

g. Submit to the RRCA a proposed study plan to determine the quantitative effects of Non-Federal Reservoirs and land terracing practices on water supplies, including whether such effects can be determined for each Designated Drainage Basin.

2. Following the RRCA's acceptance of the proposed study plan described in Subsection VI.B.1.g., the States and the United States will undertake the study at a cost not to exceed one million dollars of which the United States will be responsible for 75% of the cost and each State will be responsible for one third of the remaining 25%. The States'

portion may be provided entirely through in-kind contributions. If the cost of the study exceeds one million dollars, the United States will be responsible for the entire additional amount. The States, in cooperation with the United States, shall agree upon the timetable for the completion of such study, which shall be completed within five years of the date the proposed study plan is accepted by the RRCA.

3. Participation in the joint study does not commit any State or the RRCA to take any action or to include soil and water conservation measures in Compact accounting. Each State specifically reserves its position that it need not account for conservation measures as a Beneficial Consumptive Use under the Compact.

4. Participation in the joint study by the States or the United States is contingent upon the appropriation of funds by their respective State Legislatures and Congress. Participation by the States in this study is contingent upon participation and funding by the United States in accordance with this Subsection VI.B.

VII. Dispute Resolution

A. Initial Submission to the RRCA:

1. Any matter relating to Republican River Compact administration, including administration and enforcement of the Stipulation in which a State has an Actual Interest, shall first be Submitted to the RRCA. The United States and its agencies may attend all meetings of the RRCA. Proposed agendas, including any regular issue that may be raised, shall be distributed by the chairperson to all RRCA members at least 30 days in advance of any regular meeting and as soon as possible prior to any special meeting.

2. Each member of the RRCA shall have one vote on each issue Submitted to the RRCA. RRCA action must be by unanimous vote. Action of the RRCA shall be by formal resolution or as reflected in the approved minutes. A request for formal resolution may be made by any member.

3. Any dispute that the State raising the issue for RRCA determination believes requires immediate resolution shall be designated as a "fast-track" issue. Any "fast-track" issue will be Addressed by the RRCA within 30 days of being Submitted to the RRCA unless otherwise agreed to by all States. Nothing in this Section shall prohibit the RRCA from

Addressing a dispute prior to the expiration of the 30-day period.

4. Any dispute which the State raising the issue for RRCA determination believes does not require immediate resolution shall be designated as a "regular" issue. Any "regular" issue raised no later than 30 days prior to the next regularly scheduled meeting will be Addressed by the RRCA at that meeting.

5. The RRCA will hold regular meetings pursuant to its rules and regulations. Specially scheduled meetings to address any issue that is Submitted to the RRCA and designated as a "fast-track" issue or for any other emergency purposes shall be held if requested by any member. All members shall make a good faith effort to arrange a mutually agreeable date, time, and place for all meetings. A meeting may be conducted only when all members or their designees are available to attend. In the event a member requests a specially scheduled meeting to address a "fast-track" issue or for any other emergency purposes, such meeting shall be held as soon as reasonably possible, but in no event more than 30 days after the request is made unless more time is agreed to by all members. If scheduling a meeting in person is not possible within 30 days of a request, the members may conduct a telephone conference or use other means

available. If any such meeting is not held within thirty days because of the failure of any member other than the requesting member to attend or to agree to the date and place for the meeting, the State represented by the requesting member shall be relieved of any obligation to submit any dispute to the RRCA for potential consideration and resolution pursuant to the Stipulation.

6. Any issue Submitted to the RRCA by a State will include a specific definition of the issue, supporting materials and a designated schedule for resolution.

7. The RRCA will attempt to resolve any dispute submitted to the RRCA pursuant to this Section VII. If such a dispute cannot be resolved by the RRCA at the regular or special meeting at which the issue is addressed or within a schedule agreed to by all States, and the State raising the dispute desires to proceed, the dispute shall be submitted to non-binding arbitration unless otherwise agreed to by all States with an Actual Interest. The States involved in the dispute may agree that the arbitration shall be binding, but no State shall be subject to binding arbitration without its express written consent.

B. General Dispute Resolution Provisions:

1. Unless otherwise agreed to by all States, non-binding arbitration shall be initiated as follows: Any State, pursuant to Subsection VII.A.7., may invoke arbitration by providing written notice to the other States. A copy of any notice will be provided to the United States at the same time. Notice for the purposes of this Section shall include the time frame designation, a written description of the scope of the dispute, with sufficient detail to provide the States with an understanding of the substance of the dispute and all related issues, and sufficient information for the other States with an Actual Interest to identify the technical skills that should be possessed by potential arbitrators necessary to resolve the dispute.

2. The arbitrator(s) shall be selected as follows: Upon receipt of notice of a dispute, the States shall confer within the deadlines set forth below to choose an arbitrator(s) and the States will in good faith attempt to agree on an arbitrator(s).

3. Any person submitted as a possible arbitrator by any State, or selected by CDR Associates or other such entity, shall not be an employee or agent of any State, shall be a person generally knowledgeable of the principles of the

issues in the dispute, and shall disclose any actual or potential conflict of interest and all current or prior contractual and other relationships with any person or entity who could be directly affected by resolution of the dispute. Any person who has a contractual relationship with any State shall be automatically disqualified for conflict of interest unless the other States expressly agree in writing.

4. The arbitrator(s)' decision shall include a determination of the merits of the dispute and determination of a proposed remedy.

5. The arbitrator(s)' decision shall be provided to the States and the United States by facsimile and mail or comparable means.

6. Within 30 days of the issuance of the arbitrator's decision, the States that are parties to the dispute shall give written notice to the other States and the United States as to whether they will accept, accept and reject in part, or reject the arbitrator's decision.

7. No State shall object to admission of the arbitrator(s)' decision in any subsequent proceedings before the Court, but no State shall assert that the decision is conclusive on any issue. Further, no State shall call the arbitrator(s) as a witness with regard to the dispute.

8. A State that has submitted a disputed issue to the RRCA and to arbitration as provided in this Section VII shall be deemed to have exhausted its administrative remedies with regard to such issue.

C. Fast Track Dispute Resolution Schedule:

1. Upon receipt of notice under Subsection VII.B.1., each State with an interest in the dispute will have ten business days to amend the scope of the dispute to address additional issues, unless all States agree to a longer schedule. If unforeseen issues are identified after the deadline for amending the scope of the dispute, they may be added upon agreement of all States or at the discretion of the arbitrator.

2. Within ten business days of receipt of the initial notice, each State shall submit the names of proposed arbitrators, including qualifications, to the other States. Within seven business days of receipt of the proposed names, the States will meet, in person or by telephone conference, and confer to agree on an arbitrator(s). If the States with an Actual Interest cannot agree on an arbitrator(s), the selection of the arbitrator(s) will be submitted to CDR Associates, of Boulder, Colorado, or such other person or entity that may be agreed to by the RRCA. Every two years

the RRCA will review the entity that will select an arbitrator(s), if the States cannot choose. The States will be bound by the selection of an arbitrator(s) by CDR Associates or such other person or entity.

3. Upon selection of an arbitrator(s), the arbitrator(s) shall, within seven business days, hold an initial meeting/conference with the States, to set the schedule for submission and resolution of the pending dispute. The arbitrator(s) shall set a schedule not to exceed six months unless the States agree otherwise. The States agree to provide all information, except privileged information, requested by the arbitrator(s).

4. The arbitrator(s) shall issue a decision resolving the dispute within the shortest reasonable time, not to exceed 60 days from the date of final submission by the State parties.

D. Regular Dispute Resolution Schedule:

1. The States with an Actual Interest will agree upon the schedule for amending the scope of the dispute.

2. The States will agree upon the method and schedule for selecting an arbitrator(s).

3. The States and the arbitrator(s) will agree on a schedule for submission and resolution of the pending dispute.

4. The States will agree on a schedule for issuance of a decision by the arbitrator(s).

VIII. Non-Severability of Agreement

The agreement of the States to the terms of this Stipulation is based upon the inclusion of all of the terms hereof, and the rights and obligations set forth in this Stipulation are not severable. If for any reason, the Court should decline to approve this Stipulation in the form presented, the entire Stipulation shall be null and void and the terms of this Stipulation may not be used as evidence in any litigation between the States.

IX. Entirety of Agreement

This Stipulation and the Proposed Consent Judgment, together constitute the entire agreement among the parties hereto. No previous representations, inducements, promises or agreements, oral or otherwise, among the parties not contained in the documents identified in this paragraph or made in compliance with the requirements and obligations contained in the documents identified in this paragraph shall be of any force or effect. Nothing in this Section IX shall be construed as preventing the States from modifying the rules and regulations of the RRCA.

X. Retention of Jurisdiction by the Special Master

The Special Master shall retain jurisdiction until adoption of the RRCA Groundwater Model to:

A. Select an arbitrator, if necessary, pursuant to Subsection IV.C.9.b.ii.-iv.; and

B. Resolve disputes, not then subject to arbitration pursuant to Subsection IV.C.9., concerning the exchange and availability of data and information consistent with Subsection IV.C.4.

State Approvals of Final Settlement Stipulation
***Kansas v. Nebraska & Colorado*, No. 126, Original,**
United States Supreme Court

The undersigned Governors and Attorneys General for the States of Kansas, Nebraska and Colorado, having authority to commit the States to a final settlement, hereby commit the States to the terms of this Final Settlement Stipulation reached by their respective Settlement Negotiation Teams. Approval of this Final Settlement Stipulation is conditioned upon the inclusion of all of the terms herein, and the rights and obligations set forth in this Final Settlement Stipulation are not severable. If for any reason, the Special Master or the United States Supreme Court should decline to approve this Stipulation in the form presented, the approvals of the undersigned Governors and Attorneys General for the States shall be null and void.

/s/ Bill Graves
Governor,
State of Kansas

/s/ Carla J. Stovall
Attorney General,
State of Kansas

/s/ Mike Johanns
Governor,
State of Nebraska

/s/ Don Stenberg
Attorney General,
State of Nebraska

/s/ Bill Owens
Governor,
State of Colorado

/s/ Ken Salazar
Attorney General,
State of Colorado

APPENDIX C

Statement of Kansas Chief Engineer David W. Barfield

COMES NOW, David W. Barfield, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am Chief Engineer of the Division of Water Resources, Kansas Department of Agriculture (Kansas Chief Engineer).

2. I am a licensed professional engineer, and, as Kansas Chief Engineer, I have principal responsibility for the administration of water in Kansas, including representing Kansas on the interstate water compact administrations to which it is a party.

3. I have worked on Republican River Compact matters since 1992. From 1992 until 2007, I led technical efforts related to Kansas' interstate water issues regarding the Republican River ("Republican"). I was Kansas' representative to the Republican River Compact Administration ("RRCA") Engineering Committee from 1994 until 2007. I was the lead technical representative in the mediated negotiations between Kansas and Nebraska of 1995-1997 and was Kansas' technical representative in settlement discussions from 2001-2002. I co-authored the Accounting Procedures that became Appendix C of the Final Settlement Stipulation ("FSS"), and was a member of the Groundwater Modeling Committee established by the FSS. FSS, § IV.C. As Kansas' RRCA Engineering Committee representative following the entry of the

Supreme Court Decree of May 19, 2003 ("Decree") approving the FSS, I participated in its work to conduct a comprehensive review of the Accounting Procedures, the development of an accounting spreadsheet, and other matters related to implementation of the Decree. Since 2007, as Kansas Chief Engineer, I have represented Kansas as compact commissioner.

4. I have read the Petition to which this statement is attached as Appendix C, and the facts stated in the Petition are true and correct to the best of my knowledge, information and belief.

5. As is demonstrated herein, excessive groundwater pumping for irrigation in Nebraska is the principal cause of Nebraska's violations of the Republican River Compact and the Decree enforcing the Compact.

6. The depletion of stream flows caused by groundwater pumping is a physical process that has been well understood for many decades, and is now quantified and applied to the Republican River Basin ("Basin") using the methods agreed upon by the States, prescribed in the FSS, and approved in the Decree. The quantitative details of determining the physical impact of groundwater pumping on Republican streamflows are specified in the RRCA Groundwater Model incorporated into the Decree in this case.

7. A short explanation of the physical relationship between groundwater pumping and Republican streamflows follows:

8. The Ogallala aquifer and the alluvial aquifers associated with the Republican River and its tributaries are, in a sense, like huge underground reservoirs of sands and gravels containing water, replenished by rainfall that percolates through the overlying soils. When the reservoir is full, the overflow creates streamflow. Figure 1 (A) (from U.S. Geological Survey, Circular 1139, *Ground Water and Surface Water: A Single Resource*). When groundwater pumping begins, groundwater levels decline in the immediate vicinity of the pumping. As pumping continues, groundwater levels continue to decline and the area over which the decline occurs expands. Where the aquifer materials are uniform, the geometric shape of the water level declines resembles an inverted cone, with the apex at the well location, and is often referred to as a "cone of depression." Groundwater is induced to flow toward each pumping well location. As the cone of depression increases in size, the pumped water is derived from "stored" groundwater. Figure 1 (B). There are over 10,000 wells in the Republican Basin in Nebraska, each creating its own cone of depression and interacting with the other cones.

9. As pumping continues and the cone of depression expands laterally away from the location of pumping, it can intersect a stream, such as the Republican River or one of its tributaries. When this occurs, flow in the stream diminishes because less groundwater discharges to the stream, and/or more

water is induced to seep from the stream into the aquifer. Figure 1 (C).

10. If pumping ceases, the impact on stream flow does not immediately stop; rather, water that would have otherwise been in the stream instead refills the cone of depression, and groundwater levels slowly begin to rise toward the levels that existed before the pumping began. Consequently, streamflow does not fully recover until the groundwater levels have returned to their original level. In the Basin, depending on the location of the pumping, this recovery process would take years, decades or even longer.

11. Groundwater levels are routinely monitored at numerous locations throughout the Basin in Nebraska, and provide a direct and objective measure of groundwater conditions, trends, and the potential for future stream depletions in the basin. Groundwater levels document how much water is in the underground reservoir, and whether the amount of water in the reservoir is increasing, decreasing, or staying the same. When groundwater levels are decreasing, less water is being added to the reservoir than is being removed, thus depleting the amount of water in the reservoir. As the water in the reservoir is depleted, stream flows are also depleted due to the processes described above.

12. By assembling the data available for wells within an area, a composite characterization of groundwater level changes from year to year over the

past several decades can be developed. For example, the Upper Republican Natural Resources District ("URNRD") encompasses Perkins, Chase and Dundy counties in southwestern Nebraska (see map in Appendix 1 to the Brief).

13. Attached to this Statement is Figure 2, which depicts the average decline since 1980 in groundwater levels at 200 or so monitoring locations in the URNRD for each year, relative to average groundwater levels that existed in 1980. Figure 2 shows that, on average, groundwater levels in this district have been steadily declining at a rate of almost 1 foot per year for the better part of 30 years. Apart from some slowing of the rate of decline during the significantly wetter climatic periods of the middle 1990s and 2007-2009, the decline has been persistent and unrelenting. This is true even since accounting under the Decree began at the beginning of 2003.

14. The trend of groundwater level declines in the URNRD guarantees continuing and increasing stream flow depletions unless Nebraska takes dramatic remedial measures to reverse the declines. For example, streamflows in the upper reaches of Frenchman Creek, a major tributary to the Republican River that flows through this district, have all but vanished. Streamflows at this location are principally comprised of baseflows – discharges from the groundwater system. The annual streamflow of Frenchman Creek at the gage near Imperial, Nebraska is shown on Figure 3. This figure shows the total streamflow passing the gage for each year from

1960 through 2009. Annual streamflows prior to the late 1960s were generally in the range of 50,000 to 60,000 acre-feet. Since that time, as groundwater pumping has increased, groundwater levels have declined, and streamflows have steadily decreased, such that by 2009 the flow was less than 4,000 acre-feet, (except for major runoff that occurred in 2007). This streamflow depletion is not surprising, given the steady decline in groundwater levels and groundwater storage shown by the groundwater level data shown in Figure 2.

15. The impacts of groundwater pumping on groundwater levels and streamflows extend downstream in the basin, and accumulate in Harlan County Lake. The inflows to Harlan County Lake form a significant part of Kansas' water supply. United States Geological Survey stream gaging data on the Republican at Orleans, Nebraska illustrates the impacts of stream flow depletion from groundwater pumping on these inflows. This gage is located near the upper boundary of the lake's flood pool. It provides the best available data on inflows to Harlan County Lake from the mainstem of the Republican. Figure 4 displays the total annual stream flow at this gage from 1960 through 2009. The figure evidences the steady decline in the inflows to Harlan County Lake. Also shown in Figure 4 is the annual precipitation at Harlan County Lake. As is true at other precipitation gages in the Basin, precipitation does not decrease over time. For the most part, the overall decline in inflows shown in Figure 4 reflects the

continuing depletion of groundwater storage and groundwater discharge to the streams in the Basin above Harlan County Lake and the increasing depletion by Nebraska of water supplies relied upon by Kansas.

16. The fact that groundwater storage continues to be depleted, as is illustrated in Figure 2, indicates that stream flow depletions will continue to increase. This increasing deficit in groundwater storage means that even if groundwater pumping were to stop tomorrow, streamflow depletions will continue long into the future. In essence, groundwater storage depletions are simply streamflow depletions waiting to happen.

17. Figure 5 shows the expansion, from 1960 to 2008, of acreage within Nebraska and Kansas that is irrigated by groundwater. This data was developed by the States for the Republican River Compact Administration Groundwater Model. The expansion in groundwater-irrigated acreage since 1980 in Nebraska contrasts sharply with the lack of increase in Kansas. Much of this expansion occurred after Kansas began raising its concerns in the mid-1980s about Nebraska's overdevelopment. Even since the Decree was entered, Nebraska has allowed significant expansion in acreage irrigated by groundwater.

18. Similarly, Figure 6 shows the growth in Nebraska's groundwater pumping within the Republican River Basin over time. This data is summarized from data provided by the State of Nebraska for the

RRCA Groundwater Model. While there is significant variation year to year due to the natural variation in precipitation and other climatic factors, the increasing trend is clearly related to the expansion of irrigated acreage. While Nebraska pumping declined over the last several years, these reductions correspond to a period of unusually high precipitation, which temporarily reduced the need for irrigation water supply.

19. That Nebraska failed the first test of compliance under the FSS is not in dispute. Under the FSS, the first compliance year for the Water-Short Year test was 2006. FSS, App. B at B1. In Water-Short Year 2006, Nebraska was subject to the two-year compliance test set out in the FSS. Under this test, Nebraska was required to limit its beneficial consumptive use above Guide Rock for the years 2005 and 2006 to its allocation above Guide Rock less its imported Water Supply Credit.

Table 1 shows Nebraska's overuse for this first compliance test under the Decree, according to the methods agreed to by the States and ordered by the Court. The States agreed that Nebraska's overuse of water above Guide Rock in 2005 was at least 42,390 acre-feet. While the States agreed to all the accounting inputs and the final groundwater model run for 2006, the States disagreed over the amount of Nebraska's overuse due principally to the inability to agree on how to allocate Harlan County Lake evaporation between Kansas and Nebraska for 2006. As shown in Table 1, Kansas calculated Nebraska's overuse of its allocation for 2006 to be 36,100 acre-feet. By

comparison, in the 2009 arbitration trial, Nebraska calculated its overuse for 2006 to be 28,615 acre-feet. Under Kansas' calculations, Nebraska's average overuse is 39,480 acre-feet per year; under Nebraska's calculations, Nebraska's average overuse is 35,505 acre-feet per year.

Table 1 also shows the annual Nebraska statewide overuse for years 2003 to 2006 for Nebraska's statewide test of compliance. This compliance test is done for a 5-year average, the first of which was for 2003-2007. The States have not agreed to the 2007 accounting. However, this tabulation shows Nebraska's pattern of overuse of its statewide allocations during four of five years of the accounting period.

20. Nebraska's depletions to streamflow from groundwater pumping, as determined from the official RRCA Groundwater Model, averaged 201,960 acre-feet above Guide Rock, Nebraska, for 2005 and 2006. In those same years, Nebraska overused its allocation by an average of 39,480 acre-feet per year above Guide Rock, by Kansas' calculations. By Nebraska's calculations, Nebraska's overuse averaged 35,505 acre-feet per year. Nebraska's overuse represents a yearly consumptive water use for more than 500,000 people, assuming 125 gallons per capita per day and 50% consumptive use. Kansas Department of Agriculture Division of Water Resources, 2007 Municipal Water Use Report, Table 20, City of Salina; FSS, App. C, at C31.

To achieve compliance in the inevitable dry periods and water-short years to come, Nebraska must significantly reduce its groundwater pumping, which Nebraska has thus far failed to do. Based on the amount of its overuse in 2005 and 2006, Nebraska needs to reduce its groundwater pumping depletions to at least as low as 170,000 acre-feet or implement a hydrologically equivalent alternative. A similar result is obtained when Nebraska's overuse of its statewide allocations are considered for the last five-year period (2002 to 2006) for which the amount of consumptive use is available from agreed RRCA accounting.

21. As is described above, groundwater pumping impacts to streamflow cannot be turned on and off or even significantly reduced in the short term. Figure 7 shows how Nebraska depletions to streamflows from groundwater pumping have grown over time, and can be expected to continue to increase unless very significant actions are taken. Figure 7 shows the historic depletions through 2008, as estimated by the States using the jointly developed RRCA Groundwater Model. Figure 7 also shows a future projection that was made using the RRCA Groundwater Model to illustrate the general potential trend in depletions going forward. This projection was made by assuming long-term average conditions with average groundwater pumping per acre from the period 2003 to 2008 applied to recent irrigated acreage (2007). This 2003 to 2008 period was wetter than average in Nebraska, and so this projection represents a future condition

with less irrigation pumping per acre than has occurred historically.

22. Figure 7 demonstrates that, even assuming reduced groundwater pumping, Nebraska's impacts will extend and exacerbate the tendency to violate the Decree during dry periods. This is because Nebraska's future depletions are far above the threshold to prevent overuse during dry periods. Until Nebraska recognizes this fact and embraces the monumental changes that are needed to attain and maintain compliance with the Compact, its depletions will continue to grow, making future compliance progressively more difficult. Kansas has estimated that Nebraska must reduce its pumping by approximately 40% in order to reduce groundwater depletions sufficiently to achieve future Compact compliance or implement a hydrologically equivalent alternative. While in recent years Nebraska has preferred purchasing surface water for delivery to Kansas rather than making the necessary groundwater pumping reductions, its past purchases have been insufficient to obtain compliance. Moreover, the data presented here suggests that there will be significantly less available surface water supplies in future dry periods because of streamflow depletions caused by Nebraska's pumping. See Figs. 3, 6. Thus, Nebraska has little choice but to sharply reduce its groundwater pumping, or take some hydrologically equivalent action.

23. Nebraska's recent reduction in groundwater pumping is largely due to above average precipitation, particularly 2007 to 2009 for Nebraska's part of the Basin, which temporarily decreased the demand for irrigation water supply.

Figure 8 shows the relationship between precipitation in the Republican River basin in Nebraska and Nebraska's groundwater irrigation pumping. As precipitation increases, irrigation pumping per acre is reduced. The sum of precipitation and irrigation depth has remained relatively constant over the period.

24. As shown by the forgoing, Nebraska has violated the Decree and must take significant action immediately in order to prevent future violations of the Decree.

I state under penalty of perjury that the foregoing is true and correct.

Executed on April 26, 2010.

/s/ David W. Barfield
David W. Barfield

Attachments

Figure 1: Illustration of the Effect of Groundwater Pumping on Streamflow

Figure 2: Average Groundwater Level Decline, Upper Republican Natural Resources District, Nebraska

Figure 3: Frenchman Creek Annual Streamflow, Upper Republican Natural Resources District, Nebraska

Figure 4: Annual Republican River Streamflow and Local Precipitation, Harlan County Lake, Nebraska

Figure 5: Groundwater Irrigated Area, Republican River Basin, Nebraska and Kansas

Figure 6: Groundwater Irrigation Pumping by Nebraska, Republican River Basin, Nebraska

Figure 7: Depletions of Republican River Streamflow Above Guide Rock, Nebraska, By Nebraska Groundwater Pumping, Historical and Projected

Figure 8: Nebraska Groundwater Irrigation and Precipitation, Republican River Basin, Nebraska

Table 1: Nebraska Overuse, 2003-2006

Figure 1
Illustration of the Effect of Groundwater Pumping on Streamflow

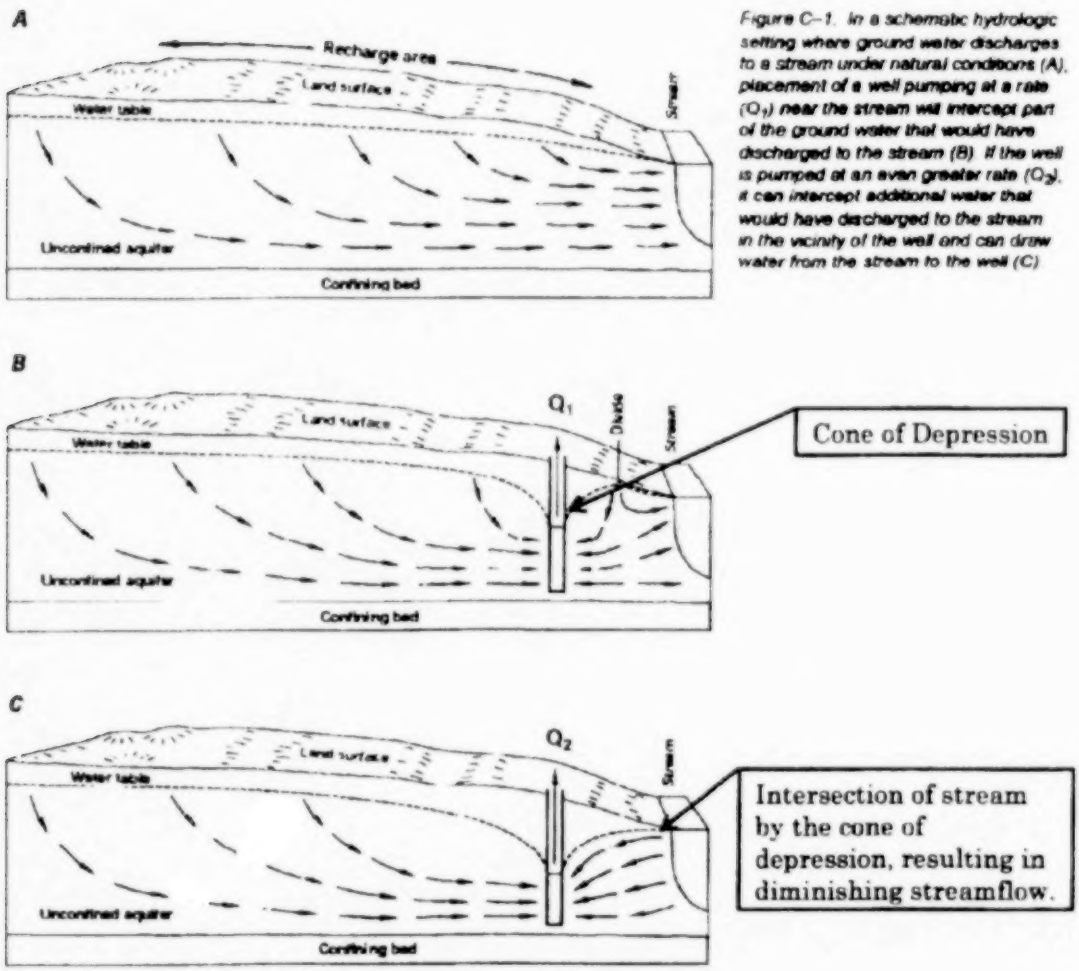
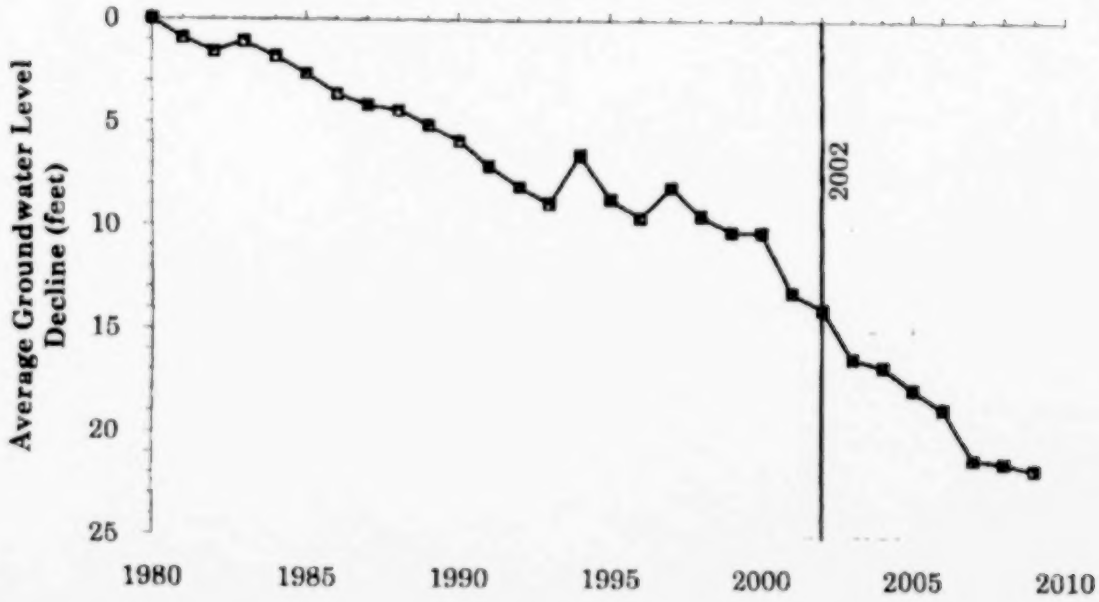


Figure C–1. In a schematic hydrologic setting where ground water discharges to a stream under natural conditions (A), placement of a well pumping at a rate (Q_1) near the stream will intercept part of the ground water that would have discharged to the stream (B). If the well is pumped at an even greater rate (Q_2), it can intercept additional water that would have discharged to the stream in the vicinity of the well and can draw water from the stream to the well (C).

Source: United States Geological Survey, Circular 1139, *Ground Water and Surface Water: A Single Resource* (1998), Figure C-1, p. 15 (Figure title and boxed annotations in red added).

Figure 2
Average Groundwater Level Decline
Upper Republican Natural Resources District, Nebraska

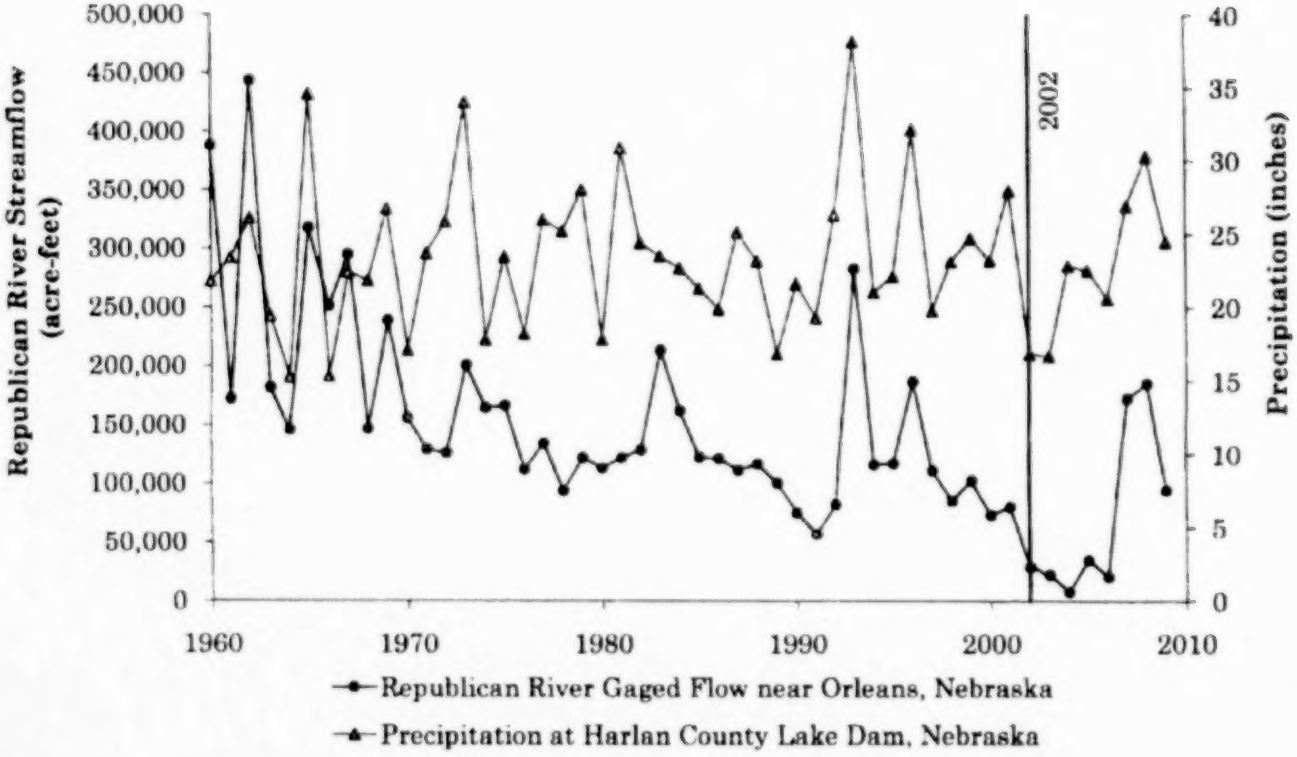


Source: United States Geological Survey National Water Information System
Note: Each data point represents the average for wells with data in 1980 and each corresponding year. Number of observations included in each average value varies from 190 to 238.

Figure 3
Frenchman Creek Annual Streamflow
Upper Republican Natural Resources District, Nebraska

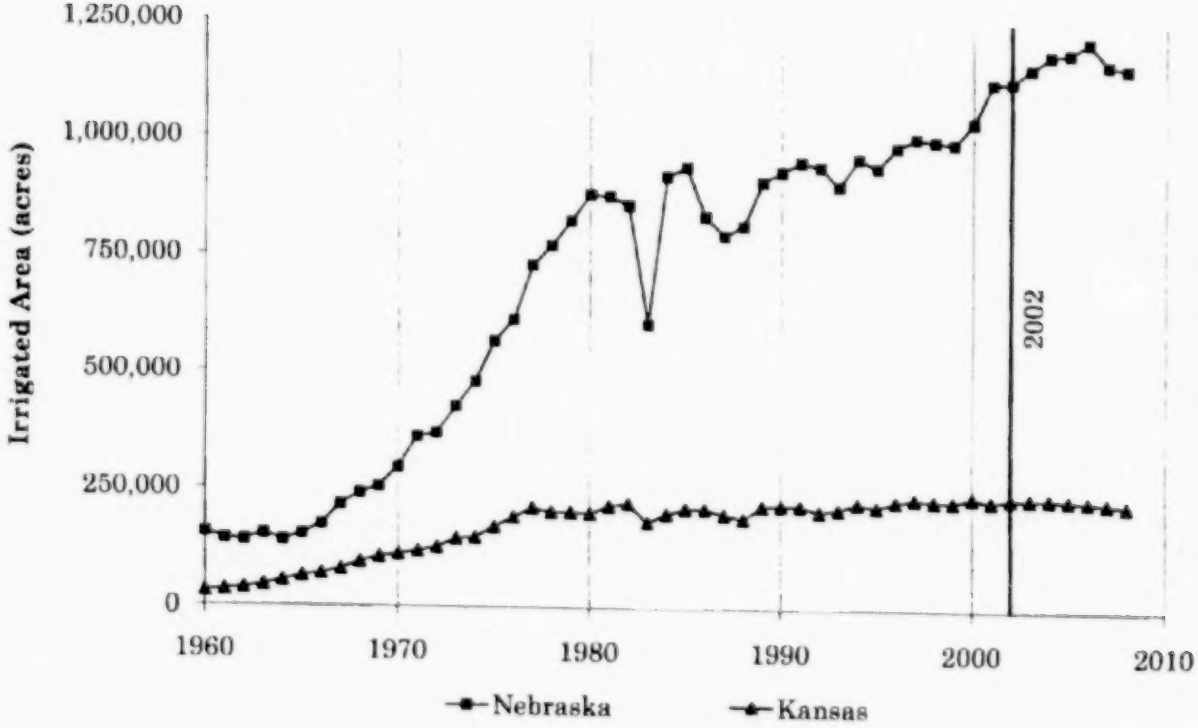
Source: United States Geological Survey (1960 - September, 1994) and Nebraska Department of Natural Resources (October, 1994 - 2009), Gage 06831500 Frenchman Creek near Imperial, Nebraska

Figure 4
Annual Republican River Streamflow [1] and Local Precipitation [2]
Harlan County Lake, Nebraska



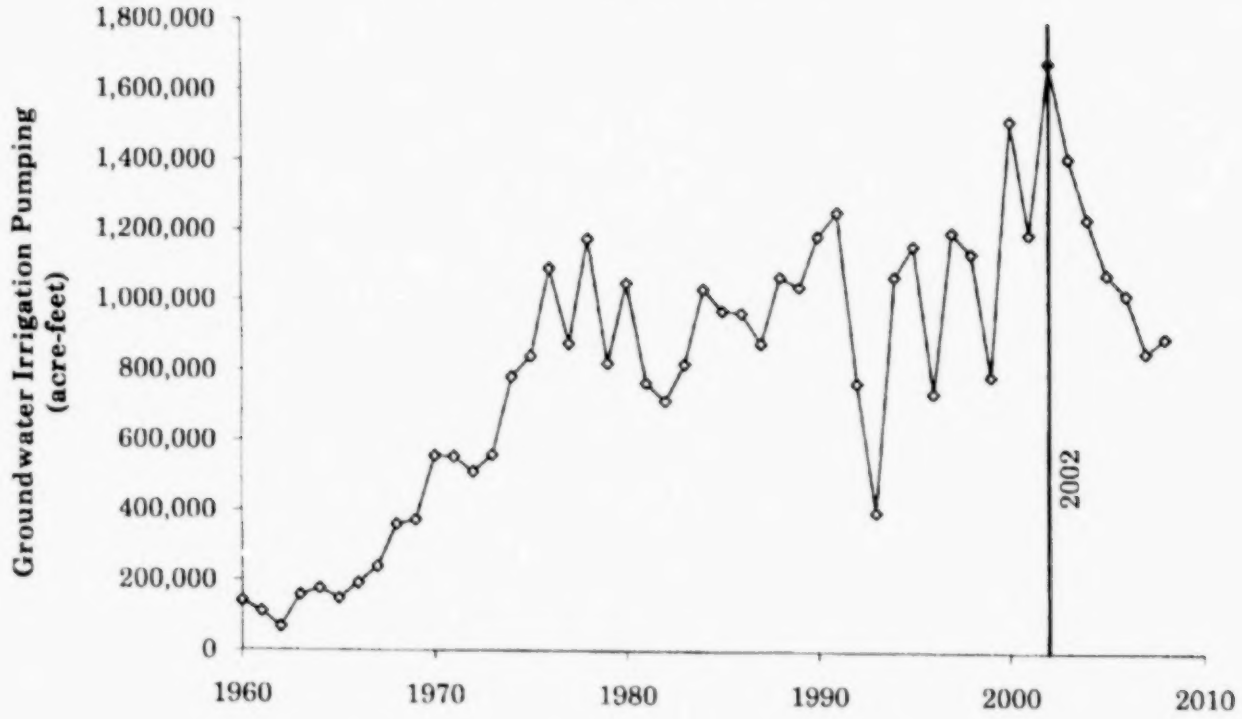
Source:
(1) United States Geological Survey Gage 06844500 Republican River near Orleans, Nebraska
(2) United States Bureau of Reclamation precipitation at Harlan County Lake Dam

Figure 5
Groundwater Irrigated Area
Republican River Basin, Nebraska and Kansas



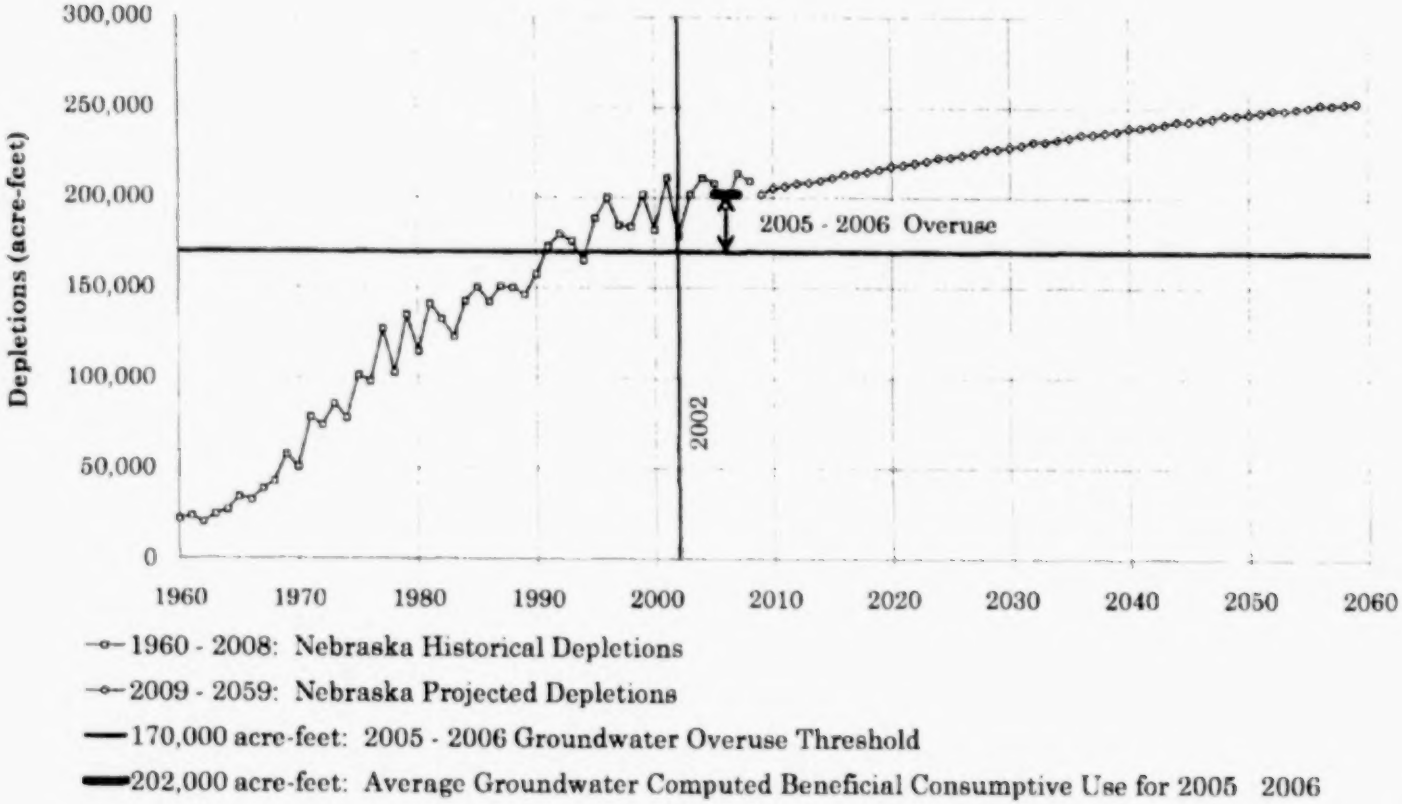
Source: Republican River Compact Administration Groundwater Model data.

Figure 6
Groundwater Irrigation Pumping by Nebraska
Republican River Basin, Nebraska



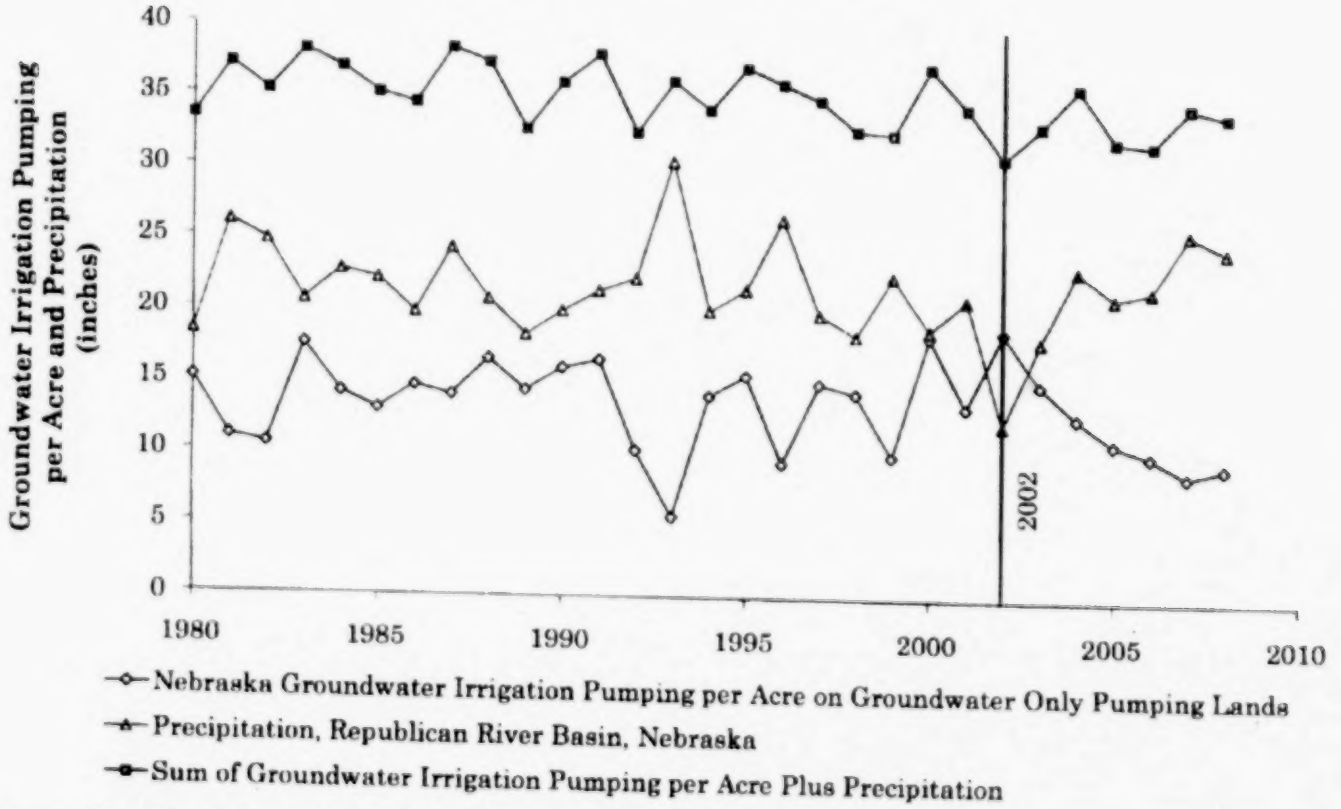
Source: Republican River Compact Administration Groundwater Model data.

Figure 7
Depletions of Republican River Streamflow Above Guide Rock, Nebraska
By Nebraska Groundwater Pumping
Historical and Projected



Source:
(1) Historical Depletions - Republican River Compact Administration Groundwater Model results.
(2) Projected Depletions Republican River Compact Administration Groundwater Model results generally based on average conditions for years 1959 2008 and 2003 2008 average groundwater pumping per acre.

Figure 8
Nebraska Groundwater Irrigation and Precipitation
Republican River Basin, Nebraska



Source: Republican River Compact Administration Groundwater Model data.

Table 1
Nebraska Overuse
2003-2006

1	2	3	4	5
Year	Water-Short Year Test Above Guide Rock		Statewide Test Above Hardy	
	per Kansas (acre-feet)	per Nebraska (acre-feet)	per Kansas (acre-feet)	per Nebraska (acre-feet)
2003			25,420	25,420
2004			36,640	36,640
2005	42,860	42,390	42,325	41,785
2006	36,100	28,615	36,880	N/A
Average	39,480	35,505	35,315	N/A
Total	78,960	71,005	141,265	N/A

Notes:

a. Columns 2 and 3 show Nebraska overuse above Guide Rock (subject to Water-Short Year accounting for 2005 and 2006).

b. Columns 4 and 5 show Nebraska statewide overuse above Hardy (subject to five-year accounting for all years, starting in 2003).

c. All values in column 2 and the 2006 value in column 4 are as determined by Kansas as shown in Kan. Exh. 1, Attachments 1 and 2 (1/20/2009) in Nonbinding Arbitration before Karl J. Dreher.

d. All values in column 3 are as determined by Nebraska as shown in the RRCA Compact Accounting spreadsheet for 2005 without non-federal reservoir evaporation below Harlan County Lake and the value determined by Nebraska for 2006 as shown in Neb. Exh. 8, Table 1, at 5 (2/17/2009) in Nonbinding Arbitration before Karl J. Dreher.

e. 2003-2005 values in column 4 are as shown in RRCA, 45th Annual Report, Eng'g Comm. Rep., Table 3C: Compact Accounting with non-federal reservoir evaporation below Harlan County.

f. Values in Column 5 are as shown in RRCA, 45th Annual Report, Eng'g Comm. Rep., Table 3C: Compact Accounting without non-federal reservoir evaporation below Harlan County.

g. N/A = not available.

No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION

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No. 126, Original

In The
Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION

The State of Kansas, in support of its Motion for Leave to File Petition ("Petition"), submits the following:

I. STATEMENT

The State of Kansas seeks by its Petition to enforce the Court's Decree entered in this case on May 19, 2003, *Kansas v. Nebraska & Colorado,* 538 U.S. 720 (2003) ("Decree"). The Decree, in turn, enforces Kansas' rights under the Republican River

Compact of 1943, 57 Stat. 86 ("Compact" or "RRC"). The Petition seeks remedies for Nebraska's past and continuing violations of the Decree, as well as remedies to provide protection against future violations.[1]

A. The Republican River Basin

The Republican River ("Republican") is an interstate river that runs for some 430 miles and drains a 24,900 square-mile basin ("Basin") located in northeastern Colorado, southern Nebraska, and northern Kansas ("States"). Unlike the Platte River to the north and the Arkansas River to the south, the Republican does not flow out of the Rocky Mountains. Rather, its upstream tributaries emerge from the arid plains of northeastern Colorado, fed by groundwater baseflows from the Ogallala aquifer and by surface water runoff. The North Fork of the Republican flows directly into Nebraska from Colorado, while the South Fork of the Republican and the Arikaree River flow first into Kansas and then into Nebraska, where they join the North Fork to form the mainstem of the Republican. From Benkelman, Nebraska, the mainstem of the Republican flows east and traverses southern Nebraska, historically gaining volume from surface tributaries, as well as from groundwater baseflow, before turning south into Kansas near

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[1] Although Colorado is subject to the Decree, no relief is sought against Colorado in this Petition. Kansas reserves the right, however, to seek similar relief against Colorado for its violations of the Decree at a later time.

Hardy, Nebraska ("Hardy"). From the stateline near Hardy, the Republican flows southeasterly, where it joins the Smoky Hill River to form the Kansas River at Junction City, Kansas. See App. 1.

B. The Republican River Compact

The Dust Bowl drought, together with a massive flood in 1935, made clear the Basin's need for federal action to provide for an adequate and more reliable water supply. As a condition of receiving federal assistance, however, the United States required the States to enter into a compact that would allocate the water in the Basin. After several years of negotiations, the States' representatives agreed to the Compact on December 31, 1942. It was then ratified by the States: Colorado by Act of March 15, 1943 (Colo. Rev. Stat. §§ 37-67-101, 102 (2009)); Kansas by Act of February 22, 1943 (Kan. Stat. Ann. § 82a-518 (1997)); and Nebraska by Act of February 24, 1943 (Neb. Rev. Stat. Vol. 2a, App. 1-106 (1995)). Congress' consent to the Compact was approved by President Roosevelt on May 26, 1943. 57 Stat. 86.

The Compact equitably divides the waters of the Basin among the States, allocating those waters according to the Republican's sub-basins and the mainstem. Specifically, the Compact allocates the "virgin water supply," defined as the water supply of the Basin that is undepleted by the activities of man, and the "beneficial consumptive use," or use by which the water supply is consumed through human

activity, including evaporative loss from reservoirs, canal systems, and irrigated fields. RRC, arts. II-IV.

Article IX of the Compact confers responsibility to administer the Compact upon the compacting States acting "through the official in each state who is now or may hereafter be charged with the duty of administering the public water supplies." In 1959, pursuant to Article IX, the States formed the Republican River Compact Administration ("RRCA"), to administer the Compact. RRCA, First Annual Report (1961). Through the RRCA, the States have the power to make rules to administer the Compact. The chief water official of each state serves as the representative to the RRCA. Each state has one vote, and any rules or other actions of the RRCA must be approved by unanimous vote. Beginning in 1959, the RRCA made computations of the virgin water supply and of the consumptive use within each sub-basin in each state for the purpose of determining compliance with the Compact.

C. Postcompact Development

After the adoption of the Compact, the Basin benefited from substantial federal investment to capture and control its water supplies. Between the 1940's and the 1960's, the U.S. Bureau of Reclamation ("Reclamation") constructed seven flood control and irrigation projects in the Basin: Bonny Reservoir in Colorado; Enders Reservoir, Swanson Lake, Hugh Butler Lake, and Harry Strunk Lake in Nebraska;

and Keith Sebelius Lake and Lovewell Reservoir in Kansas. During the same period, the U.S. Army Corps of Engineers ("Corps") completed two other reservoirs in the Basin: Harlan County Lake in Nebraska and Milford Lake in Kansas. See App. 1. Together, Reclamation and the Corps operate and maintain these federal projects for flood control, irrigation, and other purposes, in cooperation with the States.

Of particular relevance for this proceeding is Reclamation's Bostwick Division Project ("Bostwick Project"), which began operations in the early 1950s. The Bostwick Project is a surface water irrigation project supplying irrigation water to approximately 64,675 acres of land, of which 22,787 acres are located in Nebraska and approximately 41,888 acres are located in Kansas. The primary storage facility of the Bostwick Project is Harlan County Lake. Releases from Harlan County Lake, together with direct flow, are diverted at Guide Rock into the Superior Canal for irrigation on the north side of the river in Nebraska, and into the Courtland Canal for irrigation on the south side of the river in both Nebraska and Kansas. See App. 2; Bureau of Reclamation, U.S. Dep't of Interior, Resource Management Assessment, Republican River Basin 23 (1996).

Starting in the 1950s, the development of large-scale groundwater pumping began to transform the Basin. What was once an agricultural area consisting primarily of surface-water irrigation projects and dryland farming evolved into an area dominated by

groundwater pumping from the Ogallala aquifer and the alluvium of the Republican. Between 1960 and 1990, the groundwater irrigated acreage in the Nebraska part of the Basin expanded from about 175,000 acres to over 900,000 acres. The resulting increase in the amount of groundwater withdrawals began to reduce inflows into Harlan County Lake, which provides a significant part of the Compact deliveries to Kansas.

By the early 1980s, both Kansas and Colorado had severely restricted new development of groundwater irrigation in the Basin. Essentially no new groundwater irrigation was allowed in Kansas after that time. See Statement, Fig. 5. On the other hand, Nebraska had very few restrictions on the drilling of wells and use of groundwater, despite the RRCA's determination that Nebraska had been overusing its allocation in some years beginning in the late 1970s. See, *e.g.*, RRCA, 30th Annual Report 18 (1990) (showing 296,060 acre-feet of use vs. allocation of 258,660 acre-feet by Nebraska in 1989); RRCA, 31st Annual Report 13 (1991); RRCA, 32nd Annual Report 16 (1992).

D. The 1998 Bill of Complaint

To defend itself against violations of the Compact due primarily to upstream overpumping of groundwater, Kansas filed suit against Nebraska and Colorado in 1998. The Court granted Kansas' Motion for Leave to File a Bill of Complaint in January 1999,

and invited Nebraska to file a motion to dismiss to test Nebraska's position that groundwater pumping was not subject to the Compact. Special Master McKusick found that the Compact required an accounting of groundwater depletions of the flows of the Republican and recommended that Nebraska's Motion to Dismiss be denied. The Court denied the motion, overruling Nebraska's exception to the Special Master's report. See *Kansas v. Nebraska & Colorado*, First Report of the Special Master (Subject: Nebraska's Motion to Dismiss); 530 U.S. 1272 (2000). After the Court denied Nebraska's Motion to Dismiss, the States began intense negotiations to settle the remainder of the issues involved in the suit. The result of those negotiations was the Final Settlement Stipulation ("FSS"), which the Court approved in its Decree. *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003); both are reprinted in Appendix B to the Petition ("Pet. App. B").

E. The Final Settlement Stipulation and Decree

The Final Settlement Stipulation is a five-volume settlement agreement that has been approved by this Court in a final decree. It is comprehensive in nature and is the non-severable agreement by which the States determine Compact compliance. Each state, through its Governor and Attorney General, and based on the recommendation of its Compact Commissioner, signed the FSS on December 15, 2002. Pet. App. B; see Second Report of the Special Master (Subject: Final Settlement Stipulation) 24 (2003)

("Second Rep."). By this act, each state approved of the entire content of the FSS and committed to comply with its terms. In addition to the States' unequivocal consent to the agreement, the FSS was "fully support[ed]" by the United States. Second Rep. 77.

Special Master McKusick recommended that the Court approve the FSS, explaining that the binding agreement "is a series of bargained-for exchanges resulting from genuine negotiation and give-and-take among the States on many controversial issues that have divided them for years, and in some cases, decades." *Id.*, at 73. In the agreement, each state "gained much of what it most needed, rendering the settlement as fair and equitable as is practicably possible." *Id.*, at 76. Approval and entry of the FSS avoided "a very long, complex, and costly trial," *id.*, at 77, and "put[ ] back in operation the Compact's system for administration of the water of the Republican River Basin," *id.*, at 76. Special Master McKusick also considered the States' "compromise and collaborative effort" to be "superior to any possible litigated result," because, among other things, the FSS "is much more complete in breadth of subject matter and depth of specificity than could be any judgment of the Court deciding merely the issues raised by the pleadings." *Id.*, at 75-76 (footnotes omitted).

On May 19, 2003, on the recommendation of Special Master McKusick and on the Parties' Joint Motion for Approval of Final Settlement Stipulation, the Court entered the final Decree, which ordered that "[t]he Final Settlement Stipulation executed by

all of the parties to this case and filed with the Special Master on December 16, 2002, is approved." 538 U.S. 720 (2003).

The FSS incorporates, among other things, procedures to determine the virgin water supply, each state's beneficial consumptive use, credit for imported water, allocations, and compact compliance. Under the FSS, Nebraska's compliance requirements include, among others: (1) a five-year test requiring statewide beneficial consumptive use to be no more than Nebraska's statewide allocation, and (2) during water-short periods, an additional two- or three-year test requiring Nebraska's consumptive beneficial use above Guide Rock to be not more than Nebraska's allocation above Guide Rock and Nebraska's share of any unused portion of Colorado's allocation ("Water-Short Year Administration"). The FSS provides that the first five-year compliance test will be for the years 2003-2007. It also provides that the first potential water-short year test would be for the year 2006, based on the total overuse for the years 2005 and 2006. App. B to FSS, at B1.

Water-Short Year Administration is a defined term in the FSS, and Nebraska has agreed to "fixed obligations" related to these periods of reduced water supply in the Basin. Second Rep. 66. Under the FSS, Water-Short Year Administration will be in effect in years when the irrigation supply in storage in Harlan

County Reservoir is less than 119,000 acre-feet.[2] FSS, § V.B.1.a, reprinted in Pet. App. B, at B38.

The FSS requires Nebraska to "limit its Computed Beneficial Consumptive Use above Guide Rock to not more than Nebraska's Allocation that is derived from sources above Guide Rock, and Nebraska's share of any unused portion of Colorado's Allocation. " FSS, § V.B.2.a. In essence, during a Water-Short Year, Nebraska must limit its water use above Guide Rock to its allocation above Guide Rock.

The FSS allows for multi-year averaging of Compact allocations and consumptive use to determine Nebraska's compliance with its Water-Short Year Administration obligations. FSS, § V.B.2.e. The accounting procedures provide a table to compute either a two-year or a three-year average, depending on how Nebraska chooses to comply with its obligations. App. C to FSS, at C65 (Tables 5C and 5D).

F. The Current Controversy

The States' accounting results for the years 2003, 2004, and 2005 showed that Nebraska was increasingly exceeding its Compact allocation in each of those years. Nebraska's statewide allocation for 2003 was 227,580 acre-feet, which it overused by 25,420

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[2] An acre-foot of water is 325,851 gallons, which is a volume of water one acre in area and one foot deep. The Court's courtroom would hold 3⅓ acre-feet of water.

acre-feet, or 11% more than its allocation. In 2004, Nebraska's allocation was 205,630 acre-feet, which it overused by 36,640 acre-feet, or 18% in excess of its allocation. In 2005, Nebraska's percentage overuse was 21% (41,785 acre-feet in excess of its allocation of 198,940 acre-feet). See RRCA, 45th Annual Report, Eng'g Comm. Rep., Table 3C (Compact Accounting without non-federal reservoir evaporation below Harlan County (accounting approved by Nebraska)) (2006); Statement, Table 1.

The first compliance year for the Water-Short Year test was 2006. FSS App. B at B1. The test for Water-Short Year 2006 combines Nebraska's above-Guide Rock compliance accounting for 2005 and 2006. The two states agree that Nebraska's above-Guide Rock overuse in 2005 was at least 42,390 acre-feet (42,860 as calculated by Kansas; 42,390 as calculated by Nebraska). The two states also agree that Nebraska's above-Guide Rock overuse in 2006 was at least 28,615 acre-feet (36,100 as calculated by Kansas; 28,615 as calculated by Nebraska). Thus, according to Kansas, Nebraska's average overuse in 2005 and 2006 was 39,480 acre-feet per year, for a total violation of 78,960 acre-feet. Nebraska does not dispute that it violated the Decree, but it quantifies the average overuse as 35,505 acre-feet per year, for a total violation of 71,005 acre-feet. Thus, both states agree that Nebraska violated the Water-Short Year 2006 compliance test; they only differ as to the amount of the violation. Nebraska disputes only 7,955

acre-feet, or about 10% of the Kansas claim. See Statement, Table 1.

In December 2007, Kansas provided Nebraska with its proposed remedies for past overuse and to ensure future compliance by Nebraska. On February 4, 2008, Nebraska rejected Kansas' proposed remedies. Pursuant to the FSS dispute resolution procedures, Kansas presented the controversy to the RRCA on February 8, 2008. FSS, § VII.A. After the RRCA was unable to resolve the issue, Kansas, as required by § VII.B.1. of the FSS, initiated non-binding arbitration. Following initial discovery, an arbitration trial took place, resulting in a decision in the summer of 2009 and completing the requirements of the FSS for filing this Petition.

II. SUMMARY OF ARGUMENT

The special circumstances of this case strongly favor granting Kansas' Motion for Leave. First, this is essentially a continuation of the same case in which the Court previously granted leave to file in 1999. Kansas is asking the Court to entertain a request for relief pursuant to jurisdiction that is ancillary to the jurisdiction the Court exercised in entering its Decree in 2003.

Second, the Court has declared in previous interstate controversies that it will enforce its decrees against nonperforming states. Indeed, if the Court were unwilling to provide such relief, its decrees would become merely advisory and of little use in

carrying out the Court's responsibility to ensure the proper functioning of the Union's federal system of government.

Finally, Kansas' motion meets the general criteria for granting leave to file an original jurisdiction complaint. The case is of a serious and dignified nature; it involves alleged violations, in large part admitted by Nebraska, of the Court's Decree that are several times larger than violations of interstate compacts found to exist and remedied by the Court in other cases. Indeed, the amount of water depleted by Nebraska annually is equal to the amount of water that would be depleted by a city of a half million people. Future violations of Kansas' rights appear inevitable unless the Court enforces its Decree in this case. Moreover, in light of the Court's exclusive jurisdiction in this case, there is no alternative forum in which Kansas may be afforded relief.

For the foregoing reasons, Kansas submits that it would be appropriate for the Court to grant Kansas' Motion for Leave to File.

III. ARGUMENT

A. The Court Has Previously Granted Kansas Leave to File in this Case

While a federal court's jurisdiction typically ends when a case is closed and judgment entered, a court retains "ancillary" jurisdiction to "manage its proceedings, vindicate its authority, and effectuate its

decrees." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994). When a court acts for these purposes, its jurisdiction "is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825). As this Court has recognized, "[w]ithout jurisdiction to enforce a judgment by a federal court, 'the judicial power would be incomplete and entirely inadequate to the purposes for which it was conferred by the Constitution.'" *Peacock v. Thomas*, 516 U.S. 349, 356 (1996) (quoting *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187 (1867)); see also, *e.g.*, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) ("it is long settled that the courts possess inherent authority to initiate contempt proceedings for disobedience to their orders"); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51, 53 (1825) ("The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if, after the judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction").

Nebraska's overpumping of groundwater in the Basin was the basis for Kansas' previous Motion for Leave to File Bill of Complaint, filed in May of 1998. That motion was granted, with the support of the United States, in January 1999. *Kansas v. Nebraska & Colorado*, 525 U.S. 1101 (1999). Although Nebraska was allowed to file a motion to dismiss arguing that the Compact did not require accounting of groundwater pumping in the Republican River

Basin, the Special Master and the Court held otherwise. *Kansas v. Nebraska & Colorado*, 530 U.S. 1272 (2000). The parties settled the remaining issues, and the Court entered its Decree approving the FSS. *Kansas v. Nebraska & Colorado,* 538 U.S. 720 (2003). In this action, Kansas is alleging that Nebraska has violated that very Decree. This is, in essence, a continuation of the same case.

Moreover, the alleged violation of the Decree is not trivial. As described above, Nebraska's groundwater pumping has remained at or above the pumping levels that drove the filing of the Kansas Bill of Complaint in 1998. As a result, the long-term depletions of the compacted surface waters have continued to increase since the entry of the Decree. Contrary to the explicit terms of this Court's Decree, Nebraska admittedly overused its allocation above Guide Rock by an average of more than 35,000 acre-feet of water per year in 2005 and 2006. This is an annual amount over three times greater than the violation of the Pecos River Compact by New Mexico, see *Texas v. New Mexico*, 482 U.S. 124, 127 (1987) (10,000 acre-feet per year), and more than three times the violation of the Arkansas River Compact by Colorado, see *Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (9,000 acre-feet per year). The alleged violation of the Decree is a flagrant transgression of the Court's authority and of Kansas' rights under the Compact and the Decree.

B. The Court Has Previously Enforced Its Decrees in Interstate Cases

The Court has demonstrated its willingness to entertain requests from states seeking to enforce their rights under decrees of the Court. For example, in *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court entered an equitable apportionment decree on the Laramie River. In response to a suit seeking enforcement of the 1922 Decree, the Court clarified the Decree and enjoined further violations thereof. *Wyoming v. Colorado,* 286 U.S. 494 (1932); *Wyoming v. Colorado,* 298 U.S. 573 (1936). Subsequently, in July of 1939, Wyoming moved for leave to file a petition for a rule to show cause why Colorado should not be held in contempt for overdiverting water for irrigation during June and July of 1939. See *Wyoming v. Colorado*, 308 U.S. 508 (1939) (Order requiring Colorado to show cause why leave to file Wyoming's petition should not be granted). The Court subsequently issued an order requiring Colorado to "appear and show cause why it should not be adjudged in contempt for the violation of a decree of this Court." *Wyoming v. Colorado,* 309 U.S. 627 (1940). Likewise, in the present case, Kansas is alleging that Nebraska has violated this Court's Decree, which clarified and enjoined further violations of the Compact. A similar exercise of this Court's jurisdiction is therefore warranted.

To the same effect is *New Jersey v. New York,* 290 U.S. 237 (1933). In that case, New Jersey filed a petition for an order to show cause why the City of

New York should not be held in contempt for violating a decree of the Court. The Court had previously entered a decree in a form agreed to by the parties, enjoining the City of New York from dumping "garbage, or refuse or other noxious, offensive or injurious matter off the coast of New Jersey." *New Jersey v. New York*, 284 U.S. 585 (1931). The Court also required reports to be filed every six months describing progress on alternative disposal facilities and allowed the parties to apply for further relief. *Id.*, at 586-587.

When it appeared from the reports that New York would not be able to meet the Court's deadline, New Jersey filed its motion for order to show cause why the City of New York should not be held in contempt. The City simultaneously applied for an extension of the deadline. *New Jersey v. New York*, 289 U.S. 712 (1933). Seven months later, based on evidence submitted at a hearing before a special master, the Court extended the deadline, but imposed a preset penalty of $5,000 per day for failure to meet the new deadline. The Court further ordered the City of New York to reimburse New Jersey for the clean-up costs incurred and to pay the costs of the special master. *New Jersey v. New York*, 290 U.S. 237, 239-240 (1933).

In yet another case, the Court granted the request of Wisconsin and other states for a rule to show cause why the defendants, the State of Illinois and certain agencies within that state, had not taken appropriate steps to effect compliance with the

requirements of the Court's previous decree. *Wisconsin v. Illinois*, 287 U.S. 568 (1932). In the underlying case, the Court had entered a decree requiring the State of Illinois and the other defendants to take certain actions regarding construction of water works related to withdrawals of water from Lake Michigan and sanitation in the City of Chicago. *Wisconsin v. Illinois*, 281 U.S. 696 (1930). When the defendants did not complete the work as required by the decree, the complainants petitioned for the rule to show cause.

The Court set a compressed schedule for summary inquiry and report by a special master. *Wisconsin v. Illinois*, 287 U.S. 578 (1932). The master reported that the delay in completing the work was total and inexcusable, and the Court agreed that the evidence supported this finding. *Wisconsin v. Illinois*, 289 U.S. 395, 398-399 (1933). As a remedy, the Court enlarged the underlying decree and required Illinois to take all necessary steps to effectuate the decree, including the appropriation and application of sufficient financial resources. Illinois was further ordered to report its progress to the Clerk of the Court. *Wisconsin v. Illinois*, 289 U.S. 710, 711 (1933).

These cases demonstrate that the Court will not tolerate disregard by a state of the Court's decrees. Like Colorado, the City of New York, and Illinois, Nebraska has undoubtedly disregarded the Court's Decree in this case. As in those cases, it is appropriate for the Court to enforce its Decree in this case.

C. Kansas Meets the General Standard for Leave to File an Original Action

The Court has announced two factors that will guide the Court's inquiry into whether a motion for leave to file should be granted. The first is "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citation and internal quotation marks omitted). The second is whether there exists "an alternative forum in which the issue tendered can be resolved." *Ibid.*

1. Kansas' Claim is Serious and Dignified

The dispute here concerns the violation of a decree of this Court, a serious matter supporting the exercise of the Court's original jurisdiction. Nebraska's actions constitute an affront to the dignity of the Court and to the State of Kansas.

The Court has declared that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983). Nebraska, by its flagrant disregard of the Court's Decree, has deprived the State of Kansas and its people of water needed for their life and livelihood. Nebraska has abused its position as an upstream state "to control the power to feed or to starve, possessed by a river flowing through several

States." Felix Frankfurter & James Landis, *The Compact Clause of the Constitution – A Study In Interstate Adjustments*, 34 Yale L.J. 685, 701 (1925) quoted in *Texas v. New Mexico*, 462 U.S. 554, 569 n.15 (1983). As between Kansas and Nebraska, Nebraska's actions amount to what would be *casus belli* if the states were fully sovereign nations.

Justice Holmes, speaking for a unanimous Court in the context of an equitable apportionment case, described the interest that a state has in receiving its equitable share of an interstate river: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

In this case, the equitable apportionment of the Republican River has been accomplished in the Compact and quantified in the Court's Decree incorporating the detailed Accounting Procedures and RRCA Groundwater Model. Yet the equitable apportionment of the Republican has not been accomplished in fact, contrary to the Compact and this Court's specific Decree. That "necessity of life" has been denied to Kansas by the upstream state, which has possession of the resource.

In *New Jersey v. New York*, Justice Holmes described the plight in which Kansas now finds itself, at the mercy of Nebraska, when he described the relationship between New York and the downstream

states on the Delaware River: "New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated." *Ibid.* In effect, as a result of its violations, Nebraska is succeeding in destroying a significant part of Kansas' interest in the Republican River. Not only is Nebraska violating a solemn interstate compact and decree of this Court, reaping profits from doing so and causing Kansas to incur damages, but its violation is substantial and threatens to become even larger.

As discussed earlier, the alarming magnitude of Nebraska's violation is shown by comparing it to interstate water compact violations quantified in previous Court proceedings. Even if Nebraska's lower number is accepted, it averages over 35,000 acre-feet per year for the compliance accounting period of 2005-2006. During Water-Short year conditions, the FSS allows Nebraska to make up for a deficit year in the following year. Yet, despite a clear pattern of substantial overuse, Nebraska not only failed to utilize the opportunity to make up its deficit, but actually made it worse. Nebraska's failure to take action to substantially reduce its groundwater use and streamflow depletions in the years immediately following entry of the Decree resulted in escalating depletions in subsequent years. Deliveries of Harlan County Lake water to the Kansas Bostwick Irrigation

District were eliminated entirely in 2005 and severely limited in 2006.

As indicated above, Nebraska's violation over the compliance accounting period of 2005 and 2006 is more than three times greater than the violations quantified by the Court on the Pecos and Arkansas Rivers in *Texas v. New Mexico*, 482 U.S. 124, 127 (1987), and *Kansas v. Colorado*, 543 U.S. 86, 91 (2004). The Nebraska violation amounts to a depletion equal to that of a city of a half million people. Statement, § 20.

In addition to the large quantity of water involved in the past violation of the Court's Decree, Nebraska lacks the governmental institutions to ensure compliance with the Decree in the future. The Nebraska Supreme Court has unequivocally recognized the impact that groundwater pumping can have on a river like the Republican River: "Hydrologically, ground water and surface water are inextricably related. Groundwater pumping can cause diminished streamflows." *Spear T Ranch, Inc. v. Knaub*, 691 N.W.2d 116, 125 (Neb. 2005). Yet the State of Nebraska has chosen to ignore this fact:

> "But Nebraska water law ignores the hydrological fact that ground water and surface water are inextricably linked. Instead of an integrated system, we have two separate systems, one allocating streamflows and the other allocating ground water. Under constitutional and statutory provisions, streamflows are allocated by priority in time.

> Ground water, in contrast, is governed by a common-law rule of reasonableness and the GWMPA [Nebraska Ground Water Management and Protection Act]. Moreover, the lack of an integrated system is reinforced by the fact that different agencies regulate ground water and surface water. The Department of Natural Resources regulates surface water appropriations. In contrast, under the GWMPA, ground water is statutorily regulated by each Natural Resources District (NRD)." *Ibid* (citations omitted).

This statement of the Nebraska Supreme Court shows with great clarity why the State of Nebraska is institutionally handicapped when it comes to complying with the Compact and the Decree. The problem is that the local natural resources districts are governed by the groundwater pumpers themselves, whereas the obligation to comply with the Court's Decree falls on the central government of the State of Nebraska.

Although there are complicated mechanisms in Nebraska for the exercise of state control of groundwater pumping under extraordinary circumstances, these mechanisms have never been utilized. This fact adds urgency to Kansas' claim in this case, because there is no mechanism in Nebraska to control present pumping that will have effects for many years into the future.

For the reasons outlined above, Kansas' present claim is of the type and magnitude deserving of the Court's attention.

2. No Alternative Forum Exists

The dispute here falls within the Court's exclusive jurisdiction. 28 U.S.C. § 1251(a). Therefore, there can be "no alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

The Decree includes dispute resolution provisions. See FSS, § VII. These provisions require that the States submit disputes to the RRCA and to non-binding arbitration prior to seeking resolution by the Court. Both of these prerequisites have been accomplished in this case, but neither has yielded resolution of the dispute. Both Kansas and Nebraska have declined to accept the result of the nonbinding arbitration in this matter. Therefore, there is no alternative forum "in which the issue tendered can be resolved." This Court is the only forum in which relief can be obtained.

IV. CONCLUSION

Kansas' Motion for Leave to File Petition should be granted.

Respectfully submitted,

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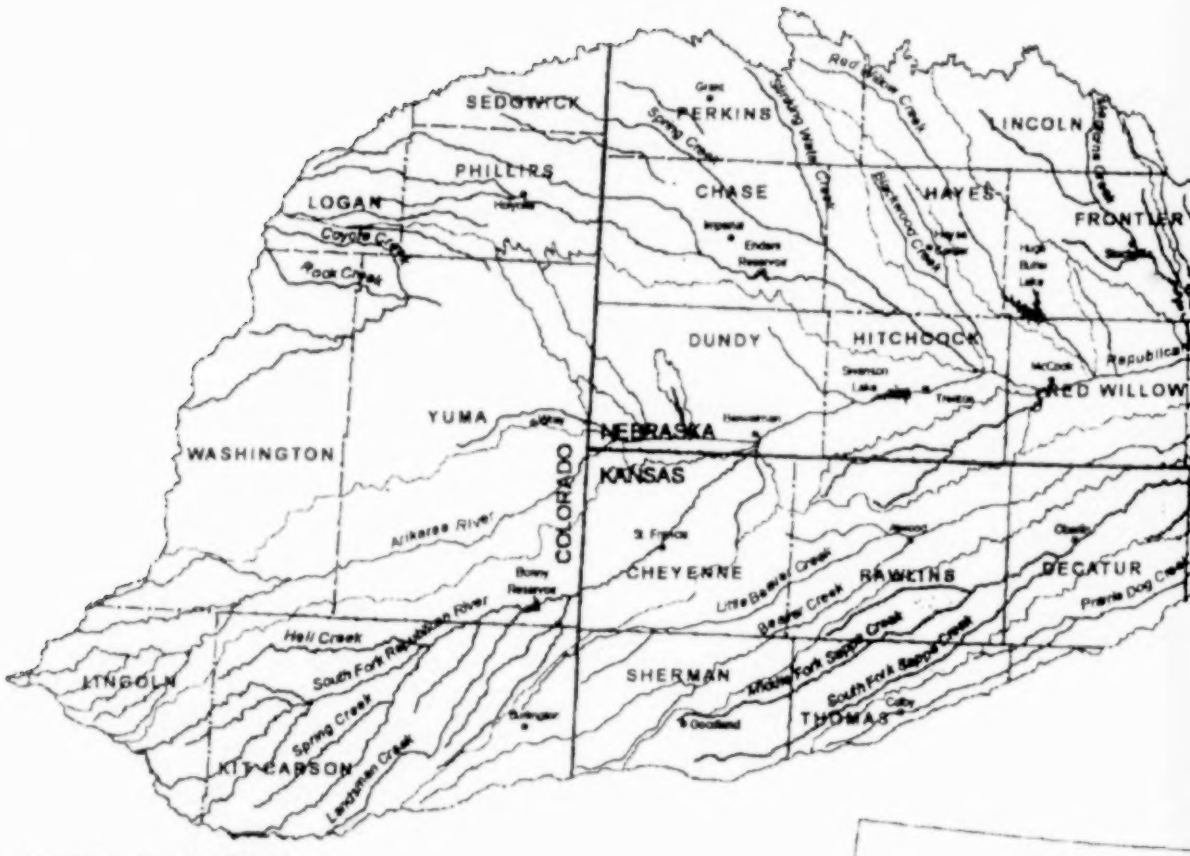
May 2010

APPENDIX 1

Republican

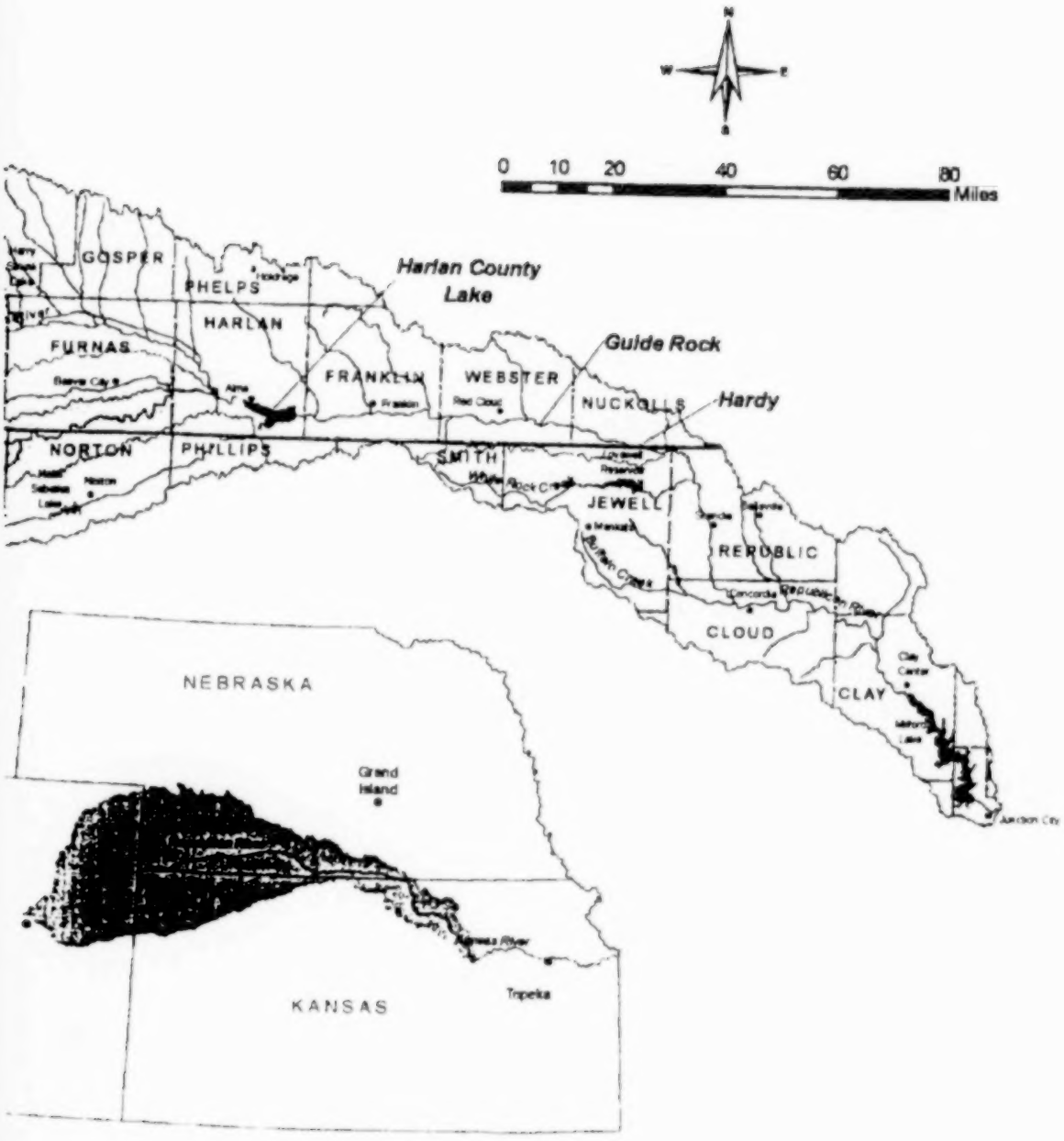


Kansas Department of Agriculture
Administrative Services, GIS
April 15, 2010

Legend

- County Seats
- Streams
- State Lines
- Lakes
- County Boundaries
- Basin Boundaries

River Basin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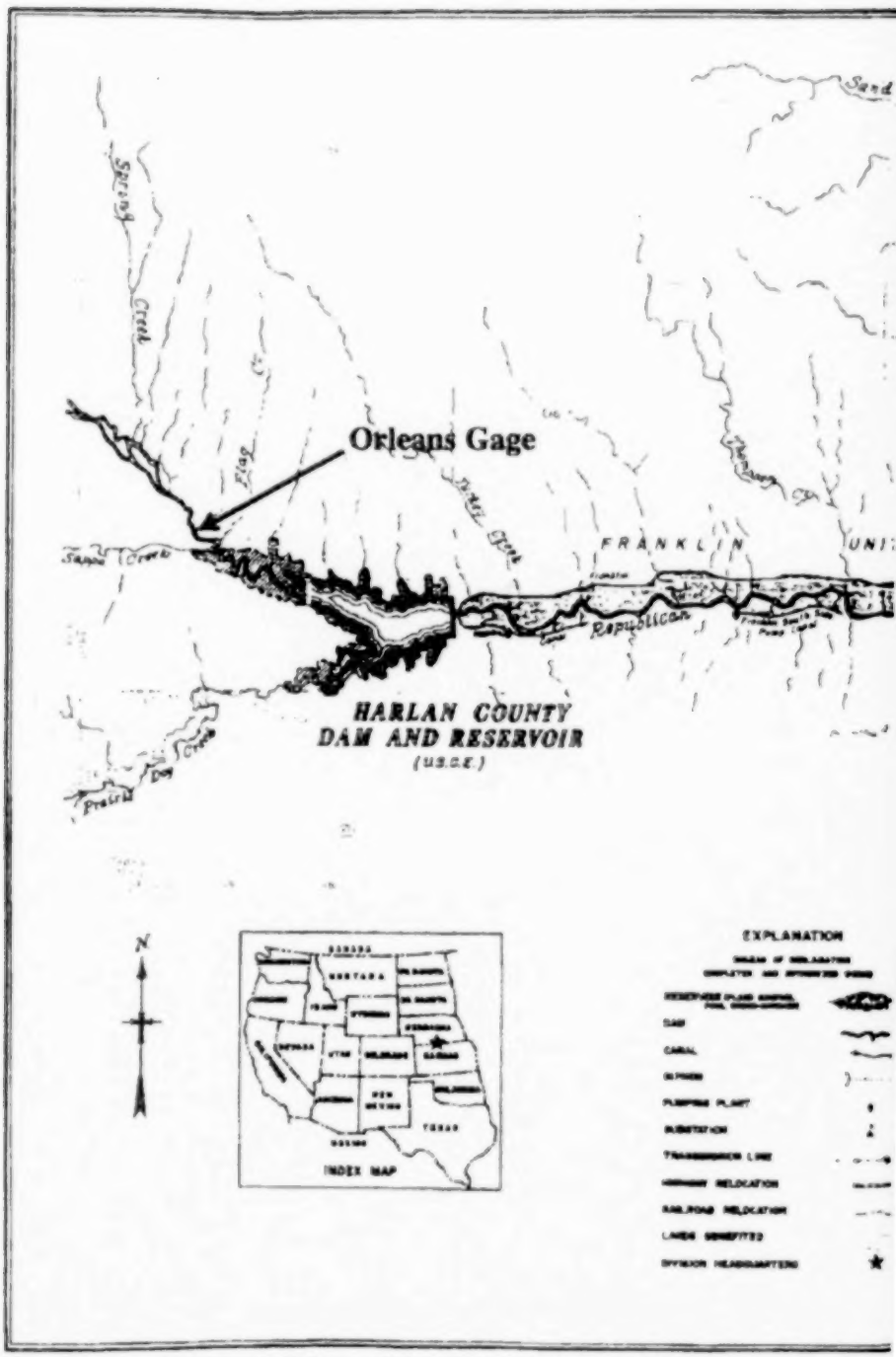
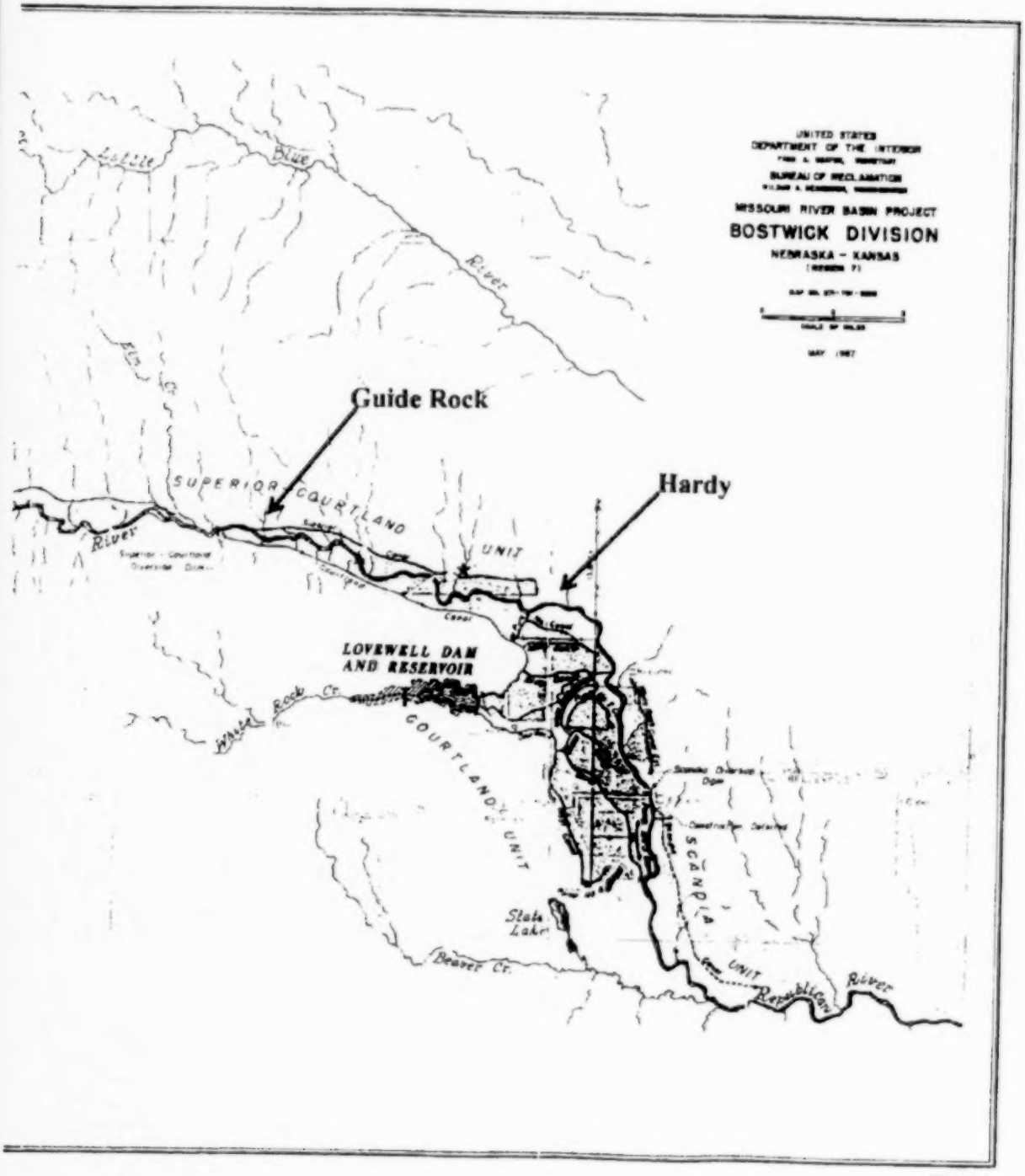
Grand Island
KANSAS
Topeka



Note: Designations of Orleans Gage, Guide Rock and Hardy are added.

APPENDIX 2


UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
MISSOURI RIVER BASIN PROJECT
BOSTWICK DIVISION
NEBRASKA - KANSAS
Guide Rock
Hardy
SUPERIOR - COURTLAND
UNIT
LOVEWELL DAM
AND RESERVOIR
White Rock Cr.
COURTLAND UNIT
SCANDIA
UNIT
State Lake
Beaver Cr.
Republican River
Blue
River